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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. [redacted] 96

ORLANDO DAILY NEWSPAPERS, INC., et al.,
Petitioners,

vs.

MELVIN M. BELLI,
Respondent.

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals
for the Fifth Circuit

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CITATIONS

CASES:

Curtis Publishing Co. v. *Butts*, 18 L. ed. 2d 1094 (1967)

New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964)

Pauling v. *Globe-Democrat Publishing Co.*, 362 F.2d 188 (8th Cir. 1966).

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Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

Petitioners, Orlando Daily Newspapers, Inc., et al., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on December 28, 1967.*

OPINIONS BELOW

The opinion of the District Court (R. 56) is unreported and is printed in Appendix A hereto, *infra*, p. 11. The opinion of the Circuit Court of Appeals (R. 97), printed in Appendix A hereto, *infra*, p. 21, is presently unreported.

* The other petitioners included in this cause are: Martin Andersen, Jean Yothers, and Leon Handley.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 28, 1967. (R. 123; p. 41, *infra*.) Rehearing was denied February 16, 1968. (R. 129; p. 43, *infra*.) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

Whether defendants, in a libel action filed by a public figure, must show that the alleged defamatory matter is directed towards the plaintiff's public conduct in order to avail themselves of the *New York Times* privilege.

STATEMENT OF THE CASE

On August 13, 1964, Melvin M. Belli filed his complaint in the United States District Court for the Southern District of Florida, Miami Division, against Orlando Daily Newspapers, Inc., et al. Jurisdiction of the district court was invoked by reason of diversity of citizenship; the plaintiff being a citizen of California and the defendants being citizens of the State of Florida and states other than California. Upon motion of the defendants, the case was transferred to the United States District Court for the Middle District of Florida, Orlando Division. (R. 16)

The complaint, which charged malicious libel *per se* and conspiracy to defame, was based upon an article that appeared in the Orlando Evening Star on March 19, 1964. (R. 3) Said article appeared as follows:

"ON THE TOWN — Florida Bar
By Jean Yothers — Got the Bill

Jack Ruby's flamboyant attorney Melvin Belli of San Francisco makes an indelible impression whither he goest.

Consider the time he and Mrs. Belli were in Miami six or so years ago and Belli was a member of a panel at a program-meeting of the Florida Bar.

Here's what happened:

In making arrangements for Belli's participation it had been pointed out to him that since there were no funds provided in the budget for the payment per se for his contribution as a lawyer to the program, the Florida Bar instead would pick up the hotel tab for himself and his wife during their stay. Belli agreed.

Oops!

A local attorney remembers, with embarrassed chagrin, how the plan backfired on the Florida Bar.

After the well-dressed Mr. Belli and his well-dressed wife left town, the hotel where they had been staying received clothing bills amounting to hundreds of $s. The Bellis had shopped in Miami stores and charged clothing bills to their hotel rooms.

The Florida Bar had been taken.

It was hard to stomach but the Board of Governors of the Florida Bar picked up the Bellis' bill.

After all, that was the plan!" (R. 11)

Pursuant to motion and order of court (R. 39), plaintiff filed an amended complaint which stated in Count II a separate cause of action against the defendant Leon Handley for malicious slander. (R. 40) (Counts I and III were substantially the same as the original two counts in the first complaint.) Motions to dismiss were then filed by all the named defendants for failure to state a claim upon which relief could be granted (R. 51) and plaintiff moved for summary

judgment. On December 30, 1965, the district court dismissed Count III (conspiracy) for being too vague and indefinite and Counts I and II for failure to state claims upon which relief may be granted. (R. 56) Final judgment was thereupon rendered in behalf of the defendants (R. 74) and plaintiff took his appeal to the United States Court of Appeals for the Fifth Circuit.

The district court, by its order dismissing plaintiff's amended complaint, held *inter alia* that in order for Count I to state a valid claim, it must sufficiently allege a publication which is libelous *per se*, since there is no sufficient allegation of special damages. (R. 60) Further, the district court held that whether the publication was libelous *per se* rather than merely libelous *per quod* (in which case the failure to allege special damages would be fatal), is a question of law for the court to determine on a motion to dismiss. (R. 61) On this basis, the court held that neither libel nor slander *per se* had been sufficiently alleged in plaintiff's amended complaint under the applicable principles of Florida law. (R. 64-65)

The United States Court of Appeals for the Fifth Circuit reversed the judgment of the district court and remanded for further proceedings. It held initially that whether the defamatory matter was libelous or slanderous *per se* should be determined by the jury rather than the court. The court also held that Count III (conspiracy) was sufficient to state a cause of action. (R. 97-115; infra, pp. 21-36)

Finally, the court's opinion considered the *New York Times* v. *Sullivan* issue which had been presented to the trial court and argued by appellees (petitioners herein) as a basis for affirming the district court's opinion. In this respect, the court of appeals recognized that the *New York Times* privilege has been extended to encompass public figures as well as public officials. However, the court stated that not only must Belli be considered a public figure before defendants can avail themselves of the *New York Times* privilege;

but the matter covered by the publication must also be of legitimate and substantial public interest. Thus, the court established a dual inquiry as a prerequisite to invocation of the privilege: (1) whether the plaintiff is a public figure and (2) whether the alleged defamatory publication is directed towards his public conduct. (R. 115-119; *infra*, pp. 36-39)

REASONS FOR GRANTING THE WRIT

1. The decision of the Fifth Circuit Court of Appeals in the instant case, with respect to its discussion of the *New York Times* privilege, is in conflict with the constitutional standard as set forth by this court in *Curtis Publishing Co.* v. *Butts*, 18 L. ed. 2d 1094 (1967); and by the Eighth Circuit Court of Appeals in *Pauling* v. *Globe-Democrat Publishing Co.*, 362 F.2d 188 (8th Cir. 1966).

In its opinion, the Fifth Circuit established a dual inquiry with respect to the applicability of the *Times* privilege: (1) whether the plaintiff is a public figure and (2) whether the alleged defamatory publication is directed towards his public conduct. Thus, held the court, defendants could not avail themselves of the privilege even if plaintiff were a public figure, unless the matter covered by the publication was of legitimate and substantial public interest. Petitioners submit the second aspect of this dual inquiry is not a proper element of the *Times* privilege.

In the *Butts* case, *supra*, this court extended the *Times* privilege to include public figures as well as public officials. This extension was based upon the premise that a public figure may have as much position and power to influence the resolution of important public issues as would a public official and should therefore be treated in a similar fashion. The court disagreed, however, with respect to the degree of fault required on defendant's part in order to overcome the qualified privilege. The majority of the court adhered to the actual malice concept advanced in the *Times* case;

while the minority expressed a new theory of highly unreasonable conduct.

But, this difference of opinion relates to the conduct of the defendant and not the nature of the publication involved. Nowhere in the *Butts* opinion did this court imply that a dual inquiry was involved before reaching the question of the defendant's conduct. If the plaintiff is determined to be a public figure by reason of his involvement in matters of substantial public interest, then he is subject to the qualified privilege advanced by *Times* and adopted by *Butts*. So also, in the *Pauling* case, once the court had concluded that Dr. Pauling was a public figure due to his projection into the arena of public controversy, then the court turned to the issue of malice. *Pauling* v. *Globe-Democrat Publishing Co., supra,* at pp. 197-98. The second aspect of the Fifth Circuit's dual inquiry was simply not considered in these cases and should not be applied as a limitation upon the First Amendment protection of *New York Times.*

2. The question presented by this petition is of crucial concern and importance to the protection of First Amendment freedoms by the state and federal courts of this country.

This court is well aware of the fundamental need to protect freedom of speech and freedom of press from undue restriction by fear of civil libel and slander actions. See generally, *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964). Conversely, the court is cognizant of the basic human need for sanctions designed to safeguard the legitimate interests of persons from malicious publication of defamatory matter. See generally, *Curtis Publishing Co.* v. *Butts, supra.* The delicate balance between these fundamental and opposing interests of our society demands a definitive statement by this court of the applicable constitutional standard as it applies to public figures.

The decision of the Fifth Circuit Court of Appeals in the opinion sought to be reviewed, provides an excellent and timely opportunity for this court to clarify the

constitutional standard of *New York Times* as it relates to public figures. The facts and circumstances surrounding this case seem to lie somewhere between those of *Butts* and *Walker*, *supra*, which cases reached opposite results. The present lack of a definitive guideline in this area of the law, is highlighted by the circuit courts' inability to shape a proper constitutional standard for the lower courts' use in the trial of this case. Until such a guideline is established by this court, the state and federal courts at both the trial and appellate levels will be unable to reach and apply consistent constitutional principles in this area of increasing national concern. Consequently, the press and public in general will remain uncertain as to the extent of their privileged comment until this issue is resolved.

3. Finally, the decision of the court below with respect to the *New York Times* privilege is believed to be erroneous and in conflict with the prior decisions of this court, as previously shown.

The Fifth Circuit Court of Appeals in its opinion, concluded correctly that it is the function of the trial court to determine whether the *New York Times* privilege is applicable to a particular case. (R. 116; *infra*, p. 36) According to the test adopted by the lower court, a dual inquiry is made: (1) whether the plaintiff is a public figure and (2) whether the alleged defamatory publication is directed towards his public conduct. *Id.* It is with the second aspect of this dual inquiry to which petitioners take exception.

According to this test, it is the trial court's function to look not only at the person (whether he is a *public* person) ; but also to the nature of the published material (whether it relates to his *public* conduct.) The first aspect is a conclusion which may be reached by an objective standard. Tangible and recognizable factors exist with respect to a person's involvement in the public arena. Thus, it is not difficult to conclude that Melvin Belli, by reason of his participation and involvement in public issues and events, may be deemed a public figure within the constitutional standard. See

Pauling v. *Globe-Democrat Publishing Co., supra.* The second aspect, however, is not so capable of an objective judicial test. By what objective standard are we to determine whether Mr. Belli's conduct at the Florida Bar Convention was an aspect of his public or private life? Where is the line to be drawn in each case separating a person's private life from his public conduct? Moreover, is this distinction relevant to the policy behind the *Times* privilege?

The essential and inherent flaw in the lower court's opinion lies in its statement with respect to this second aspect, that: "the matter covered by the publication must be of *legitimate* and *substantial* public interest." (R. 116; *infra*, p. 37 (Emphasis added.) Whether the publication is of *substantial* public interest is merely a factor to consider which relates to the determination of whether the person is a public figure. It may be said (almost by definition) that a defamatory publication concerning a public person is necessarily of substantial public interest. But, the *legitimate* public interest factor goes beyond the bounds of the constitutional standard. Should the *New York Times* privilege be restricted to those instances only in which the public has a *legitimate* interest in the publication? If so, is the trial court capable of ascertaining what constitutes legitimate public interest? Petitioners submit the answers to both above questions must be answered in the negative. To hold otherwise would be to deprive the press and public of the very freedoms which this court has sought to protect in *New York Times* and its progeny.

The difficult and perplexing problem presented by this area of constitutional law was well stated by the court in *Curtis Publishing Co.* v. *Butts, supra,* at p. 19; infra, p. 53:

> "Thus some antithesis between freedom of speech and press and libel actions persists, for libel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments, at least with-

out guaranteeing legal proof of their substantial accuracy."

The court ostensibly resolved this problem by shifting the judicial perspective from the public figure aspect to the conduct of the defendant. As stated by the court, "It is the conduct element, therefore, on which we must principally focus if we are successfully to resolve the antithesis between civil libel actions and the freedom of speech and press." *Id.* at p. 20; *infra*, p. 63. Furthermore, this court, in support of the above reasoning, specifically refuted the second aspect of the Fifth Circuit's test when it next stated:

> "Impositions based on misconduct can be *neutral with respect to content of the speech involved*, free of historical taint, and adjusted to strike a fair balance between the interests of the community in free circulation of information and those of individuals in seeking recompense for harm done by the circulation of defamatory falsehood." *Id.* (Emphasis added.)

Thus, petitioners contend that the subject matter of the alleged defamatory conduct is not a relevant concern, and the dual inquiry suggested by the lower court is not proper. The court's first and only concern before reaching the question of defendants' conduct should be whether or not plaintiff is a public figure within the constitutional standard. This would involve a determination whether he is so involved in the arena of public controversy and events as to have the position and power to influence the resolution of important public issues. If the plaintiff is such a person, any comment concerning him should be afforded the qualified privilege of *New York Times*. To require the additional inquiry into the nature of the publication would create an improper and unworkable standard which would destroy the efficacy of the *Times* privilege.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM Y. AKERMAN
Counsel for Petitioners

APPENDIX A

United States District Court
Middle District of Florida

ORLANDO DIVISION

MELVIN M. BELLI,
Plaintiff,

vs.

ORLANDO DAILY NEWSPAPERS, INC., et al.
Defendants.

No. 64-131-ORL.-CIVIL

ORDER

This action was commenced in the Southern District of Florida. Defendants, Martin Andersen, Jean Yothers and Orlando Daily Newspapers, Inc., filed a Motion to Dismiss and Alternative Motion to Transfer. The motion challenged venue, jurisdiction and the legal sufficiency of the claim stated. The venue question came on for a hearing, and by Order of November 6, 1964, Judge David W. Dyer transferred the case to the Middle District. The jurisdiction question was not decided by that order.

Upon amendment of the complaint allowed by Order of this Court, dated March 26, 1965, defendant Leon Handley was added as a party and certain allegations of slander relating to him and now constituting Count II of the Amended Complaint were added.

The alleged libelous article appeared in the Orlando Evening Star on or about March 19, 1964 under the title, "On the Town" by defendant Jean Yothers and headed "Florida Bar Got the Bill," reading as follows:

> "Jack Ruby's flamboyant attorney Melvin Belli of San Francisco makes an indelible impression whither he goeth.
>
> Consider the time he and Mrs. Belli were in Miami six or so years ago and Belli was a member of a panel at a program-meeting of the Florida Bar.
>
> Here's what happened:
>
> In making arrangements for Belli's participation it had been pointed out to him that since there were no funds provided in the budget for payment per se for his contribution as a lawyer to the program, the Florida Bar instead would pick up the hotel tab for himself and his wife during their stay. Belli agreed.
>
> Oops!
>
> A local attorney remembers, with embarrassed chagrin, how the plan backfired on the Florida Bar.
>
> After the well-dressed Mr. Belli and his well-dressed wife left town, the hotel where they had been staying received clothing bills amounting to hundreds of $s. The Bellis had shopped in Miami stores and charged clothing bills to their hotel rooms.
>
> The Florida Bar had been taken.
>
> It was hard to stomach but the Board of Governors of the Florida Bar picked up the Bellis' bill.
>
> After all, that was the plan!"

The foregoing article is the basis for Count I of the Amended Complaint. No allegations of special damages are contained in Count I or any of the other counts of the Amended Complaint.

The allegedly slanderous publication forming the basis of Count II is recited in the complaint as follows:

> " '[T]he Florida Bar wanted Belli to appear on a program and they informed him that they had—that they didn't have the money in the budget to pay him, but as a lawyer maybe he would agree to the plan of attending and participating and having his hotel bill paid for, and he agreed and came down here and was on the program, and after he and his wife had gone they discovered the hotel bill, that they had charged some clothing to their hotel bill . . . 'about $300.00' . . .
>
> 'that the Florida Bar was embarrassed over it.' . . . 'the whole thing was an embarrassment to every member that knew about it' . . .
>
> 'that although Belli had been informed of the scarcity of funds and had agreed to come down just for his transportation and hotel bill, he still ran up a bunch of bills' . . ."

Count III is apparently founded on conspiracy to defame.

This cause came on to be heard on October 18, 1965, upon the following motions: (1) Plaintiff's Motion for Leave to Amend His Complaint; (2) Defendants, Orlando Daily Newspapers, Inc., Martin Andersen, and Jean Yothers' Motion to Dismiss Plaintiff's Amended Complaint; (3) Defendant Leon Handley's Motion to Dismiss Plaintiff's Amended Complaint; (4) Plaintiff's Motion for Summary Judgment; and (5) Motion of the defendants Orlando Daily Newspapers, Inc., Martin Andersen, and Jean Yothers to strike Plaintiff's Motion for Summary Judgment, or, in the alternative, continue the hearing thereon. The Court having heard oral argument of counsel, having re-

viewed the briefs submitted and being otherwise duly advised in the premises,

THIS COURT FINDS that justice requires that leave be granted to plaintiff to amend his complaint by adding certain allegations to meet the jurisdictional question previously raised.

It is the opinion of the Court that Count III of the complaint is too vague and indefinite to state a claim upon which relief may be granted.

It is the opinion of the Court that Counts I and II of the complaint fail to state claims upon which relief may be granted. This case being founded on diversity of citizenship under 28 U.S.C. § 1332(c), the question of whether any count of the complaint states a claim upon which relief may be granted is to be determined on the basis of the laws of the State of Florida.

In order for Count I of the complaint to state a valid claim in libel *per quod*, it would have been necessary that it specifically allege special damages, and "it is not sufficient to allege merely that plaintiff has been injured in name and fame." 86 A.L.R. 848, Annotation; *Layne* v. *Tribune Co.*, (Fla. 1933), 146 So.2d 234, 86 A.L.R. 466; see also *Commander* v. *Pedersen*, (Fla. 1934), 156 So. 337. As there is no sufficient allegation of special damages in Count I of the complaint, 86 A.L.R. 848, Annotation, whether that Count states a sufficient claim of libel must be determined solely on the basis of whether it sufficiently alleges a publication which is libelous *per se*.

There are four classical categories of writings which are libelous *per se*. These are writings which impute (1) a crime, (2) a loathsome disease, (3) unchastity to a woman, or (4) cast aspersions on one in his trade, business, office or profession. Prosser, *Torts*, § 93, at 588. Florida courts recognize another category, *viz.*, those writings tending to "subject a person to hatred, distrust, ridicule, contempt or disgrace . . ." *Adams* v. *News-Journal Corp.*, (Fla. 1955),

84 So.2d 549, 551. Under Florida law, "Libel *per se* may be defined as the false and unprivileged publication by a letter, newspaper, or other form of writing of unfounded statements or charges . . . which are such that their natural and proximate consequence, will necessarily cause injury to the person concerned, in his personal, social, official, or business relations of life, so that legal injury may be presumed or implied from the bare fact of the publication itself." *Layne* v. *Tribune Co.*, (Fla. 1933), 146 So.2d 234, 236.

Count I of the complaint sets out in full the alleged libelous publication. Whether that publication is libelous *per se*, so that damages may be "presumed or implied from the bare fact of the publication itself," rather than merely libelous *per quod*, in which case the failure to allege special damages would be a fatal defect, is a question of law for the court to determine on a motion to dismiss. While there is some authority to the contrary, the majority rule in the United States is that whether a given writing is or is not libelous *per se* is a question of law for the court to determine.

The Court has reviewed the Florida appellate decisions regarding libel *per se*, to determine whether or not the majority rule in the United States has been adopted in the State of Florida. While those cases do not disclose any clear statement that the existence of libel *per se* is a question for the court and not for the jury, the Court interprets those cases as establishing this as a *sub silentio* proposition of Florida law. In not a single one of those cases found was the issue of language being libelous *per se* submitted to the jury. In each reported Florida case, this question of libel *per se* or slander *per se* was passed upon by the court as a matter of law.

In *Adams* v. *News-Journal Corp.*, (Fla. 1955) 84 So.2d 549, the Supreme Court of Florida, sitting *en banc*, went through a detailed examination and analysis of the offending publication, in an attempt to determine whether or not that publication constituted libel *per se* as to the plaintiff-attorney. The opinion states in part:

"The task of testing the effect of the language used is not an easy one because there is no fixed rule that would guide us to a conclusion. The judgment in each case must depend upon the facts peculiar to that case and a search for two identical instances would probably be unrewarded.

We will undertake to interpret the editor's phraseology 'as the common mind would understand it.' Lobe v. Geronemus, Fla. 66 So.2d 241, 245.

* * *

Our study of the article brings us to the view that it constituted a criticism of a system by which the attorney acted within bounds, but within bounds the writer thought should be contracted and succeeded in keeping a rascal from being tried. Although by the use of our 'common mind' we can understand how irked the appellant might have become by the comment on the procedure that irked the editor, we do not find from the whole editorial, and such of the circumstances of its publication as are apparent in the record, the qualities which would stamp it as libelous per se. Cooper v. Miami Herald Publishing Co., (Fla. 1947) 31 So.2d 382."

McCormick v. *Miami Herald Publishing Co.*, (Fla. App. 2d 1962), 139 So.2d 197, was a case wherein, as here, the complaint alleged no special damages. Therefore, the plaintiff conceded that if the alleged publications were not libelous *per se* then the complaint failed to state a cause of action. The court dismissed the complaint, finding as a matter of law that no libel *per se* was alleged therein. In the Court of Appeals decision, wherein the allegations relating to the libel were set out in full, it is said: "The language of the published articles should not be interpreted by extremes, but should be construed as the common mind would naturally understand it."

In *Budd* v. *J. Y. Gooth Co.*, (Fla. 1946), 27 So.2d 72, the allegedly libelous statement was that a Mrs. E. L. S. Budd was the "common law wife" of a Mr. R. D. Budd. Plaintiff's position was that the use of the term "common law wife" was not only defamatory but was libelous *per se*. Holding as a matter of law that no allegations of libel *per se* existed, in spite of the plaintiff's urging that the "generally accepted meaning of the term 'common law wife'" was the existence of a state of concubinage, the court said in part:

> "Innuendoes in the pleading are ineffective for the purpose of fixing the character of an alleged libelous publication per se. Usually, the courts will look to the language of the publication, rather than the innuendoes, in reaching a conclusion as to whether or not the publication is libelous per se or actionable only per quod." *Id.* at 74.

In *Campbell* v. *Jacksonville Kennel Club*, (Fla. 1953), 66 So.2d 495, the Supreme Court of Florida affirmed the trial court's holding that calling someone a "stoop" was not slanderous *per se*, even given the circumstances that the plaintiff was attempting to cash a race track ticket and the fact that the word "stoop" means, in race track circles, a "person who picks up race track tickets off the ground and attempts to cash them in as his own purchased tickets." Again, the Supreme Court was deciding as a matter of law that particular statements were not defamatory *per se*, and did so without discussion of the possibility that the question could have been submitted to the jury.

The Court is aware of the fact that the trial court in *Miami Herald Publishing Co.* v. *Brautigan*, (Fla. App. 3d 1963), 127 So.2d 718, submitted the question of libel *per se* to the jury. In doing so, the trial court appeared to act in contradiction to the Florida appellate case law and the majority of cases in the United States.

Count I of plaintiff's complaint can, under Florida law, state an actionable claim only if it is further

determined that the publication in question was libelous *per se* as a matter of law.

This Court holds that the complaint does not allege libel *per se* of the plaintiff in either his personal or professional capacity. The article, as alleged in Count I of the complaint, did not, by the application of the "common mind test," subject the plaintiff to "hatred, distrust, ridicule, contempt or disgrace . . ." *Adams* v. *News-Journal Corp.*, *supra*, at 551.

In determining whether there is a slander *per se* alleged in Count II of the complaint, this Court applies the law of Florida as it was stated in *Loeb* v. *Geronemus*, (Fla. 1953), 66 So.2d 241, as follows:

> "Only certain well-defined classes of imputation as to crime, disease, particular unfitness for office, etc., or unchastity, have been deemed slanderous *per se*, and in other instances of slander *per quod* special damages must be set forth."

If the publication is slander *per se*, it could only fall into the category of unfitness for office which includes unfitness for trade, business or profession.

This Court concludes, as a matter of law, that Leon Handley's alleged publication did not fall within this category, because nothing within the statements alleged to have been spoken by Leon Handley characterized the plaintiff as unfit or unable in his profession, or imputed to him characteristics that are incompatible with the exercise of his profession.

In view of all the foregoing, it is

ORDERED and ADJUDGED that plaintiff's Motion for Leave to Amend his Complaint be, and the same is hereby granted, and the Motions to Dismiss were considered as addressed to the complaint as so amended. It is further

ORDERED and ADJUDGED that each of the Motions to Dismiss plaintiff's Amended Complaint for failure to state a claim upon which relief may be

granted be, and the same are hereby granted as to each and every defendant without prejudice, and with leave to plaintiff to amend within thirty (30) days from the date of this Order, at the end of which thirty (30) days the Order shall be with prejudice if plaintiff has failed to amend by that time. It is further

ORDERED and ADJUDGED that the motions as to summary judgment shall not be determined or passed upon by the Court at this time.

DONE and ORDERED in Chambers at Orlando, Orange County, Florida, this 30th day of December, 1965.

/s/ GEORGE C. YOUNG

United States District Judge

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 23623

MELVIN M. BELLI,
Appellant,

versus

ORLANDO DAILY NEWSPAPERS, INC., ET AL.,
Appellees.

Appeals from the United States District Court for the Middle District of Florida

(December 28, 1967.)

Before WISDOM and GODBOLD, Circuit Judges, and McRAE, District Judge.

WISDOM, Circuit Judge: This action for damages for libel and slander is based on a false statement relating to Mr. Melvin Belli. Belli, an attorney of national prominence, is well known in the legal profession for his pioneering in the development of demonstrative evidence as a trial tactic and his success in obtaining large judgments for plaintiffs in personal injury suits. He is well known to the general public because of his representation of Jack Ruby and others in the public eye.

In March 1964 Mr. Leon Handley, an attorney in Orlando, Florida, in a conversation with Miss Jean Yothers, a columnist for the Orlando Evening Star, repeated a story he had heard concerning Belli. Handley told Yothers that the Florida Bar Association had invited Belli to serve as a member of one of the panels on the program of the Association at its 1955 Convention in Miami Beach. Belli agreed, with the understanding that "since there were no funds provided in the budget for the payment per se for his contribution as a lawyer to the program the Florida Bar instead would pick up the hotel tab for himself and his wife during their stay." According to Handley, after Mr. and Mrs. Belli left Florida, the Association discovered that the Bellis "ran up a bunch of [clothing] bills" which they charged to their hotel room.[1] The derogatory portion of the story was admittedly false: the Bellis had not charged any purchases to their hotel account. Unfortunately for all, Jean Yothers reported, with embellishments, this nine-year old story in her gossip column in the Orlando Evening Star for March 19, 1964. She commented, in part: ". . . Oops! . . . the plan backfired on the Florida Bar . . . [Mr. Belli and 'his well-dressed wife' had charged] clothing bills amounting to hundreds of $s . . . to their hotel rooms

[1] Handley's story, as recited in the complaint is as follows:

[T]he Florida Bar wanted Belli to appear on a program and they informed him that they had—that they didn't have the money in the budget to pay him, but as a lawyer maybe he would agree to the plan of attending and participating and having his hotel bill paid for, and he agreed and came down here and was on the program, and after he and his wife had gone they discovered the hotel bill, that they had charged some clothing to their hotel bill . . . about $300.00. . . .

. . . that the Florida Bar was embarrassed over it. . . . the whole thing was an embarrassment to every member that knew about it. . . .

. . . that although Belli had been informed of the scarcity of funds and had agreed to come down just for his transportation and hotel bill, he still ran up a bunch of bills. . . .

.... The Florida Bar had been taken.... After all, that was the plan!"[2]

On these facts, Belli brought this diversity action. The complaint alleges that (1) Yothers, the Orlando Evening Star, and its editor libeled Belli through publication of the article, (2) that Handley slandered Belli in making the false statement to Yothers, and (3) that all of these parties, with others, participated in a conspiracy to defame Belli.

The district court dismissed Belli's complaint for failure to state a claim upon which relief could be granted. The court relied on the erroneous assumption that the determination whether a statement is a libel (or slander) per se is solely for the court. We consider it a close question whether the publication is so clearly

[2] The article appeared in the Orlando Evening Star under the title "On the Town" by Jean Yothers and headed "Florida Bar Got the Bill". The full text is as follows:

Jack Ruby's flamboyant attorney Melvin Belli of San Francisco makes an indelible impression whither he goeth.

Consider the time he and Mrs. Belli were in Miami six or so years ago and Belli was a member of a panel at a program-meeting of the Florida Bar.

Here's what happened:

In making arrangements for Belli's participation it had been pointed out to him that since there were no funds provided in the budget for payment per se for his contribution as a lawyer to the program, the Florida Bar instead would pick up the hotel tab for himself and his wife during their stay. Belli agreed.

Oops!

A local attorney remembers, with embarrassed chagrin, how the plan backfired on the Florida Bar.

After the well-dressed Mr. Belli and his well-dressed wife left town, the hotel where they had been staying received clothing bills amounting to hundreds of $s. The Bellis had shopped in Miami stores and charged clothing bills to their hotel rooms.

The Florida Bar had been taken.

It was hard to stomach but the Board of Governors of the Florida Bar picked up the Bellis' bill.

After all, that was the plan!

defamatory that as a matter of law the case should not be submitted to the jury. We hold, however, that the publication itself, without reference to extrinsic facts, is capable of carrying a defamatory meaning. It is for a jury to determine whether it was so understood by the "common mind". We reverse and remand.

I.

Historically, libel, as generally distinguishable from slander, was actionable without the necessity of pleading or proving that the plaintiff had suffered any damages as a result of it.[3] That is the accepted rule today in England[4] and in many jurisdictions in the United States[5] both as to libel per se and libel per quod.[6] A libel per se is one that is defamatory on its face, including a publication that is susceptible of several meanings, one of which is defamatory; it is actionable without proof of special harm. A libel per quod is one in which the defamatory meaning, or innuendo, is not apparent on the face of the publication, but must be established by proof of extrinsic facts. Here the district court held, correctly, that the Belli claim "must be determined solely on the basis of whether it sufficiently alleges a

[3] For a general discussion of the history of the law of defamation, see Veeder, The History and Theory of the Law of Defamation, 3 Colum. L. Rev. 546 (1903), 4 Colum. L. Rev. 33 1904). See also Plucknett, A Concise History of the Common Law, 454 (4th ed. 1948); 2 Pollock & Maitland, The History of English Law 536-38 (2d ed. 1898).

[4] Youssoupsoff v. Metro-Goldwyn-Mayer Pictures, 1934, 50 T.L.R. 581.

[5] See Prosser, The Law of Torts 781 (1964).

[6] Dean Prosser asserts that this is now the rule only in a "small minority of the American Jurisdictions". Prosser, The Law of Torts 781 (1964); Prosser, Libel Per Quod, 46 Va. L. Rev. 839, 644-47 (1960); Prosser, More Libel Per Quod, 79 Harv. L. Rev. 1629 (1966). But see Eldridge, The Spurious Rule of Libel Per Quod, 79 Harv. L. Rev. 733 (1966). See various tentative drafts of the A.L.I. Restatement of Torts, Second.

publication which is libelous per se"— since, as is evident from the complaint, the plaintiff did not allege defamation by extrinsic facts or plead special damages.[7]

A. In its opinion below the court recognized that there are four categories of defamatory imputations which traditionally have been considered actionable without proof of harm. As set out in the Restatement of Torts, Second, Tentative Draft 12, Section 569, these are statements which impute to another "(1) a criminal offense, (2) a loathsome disease, (3) matter incompatible with his business, trade, profession or office, and (4) unchastity on the part of a woman plaintiff". Such defamatory statements, whether the publication is in the form of libel or in the form of slander, are regarded as especially likely to cause harm to the reputation of the person defamed, although such harm is not and perhaps cannot be proved. See Restatement, Second, Tentative Draft 12, Sections 569-574; Prosser, Law of Torts § 107 (1963); I Harper and James § 5.9 (1956). Florida law recognizes these four traditional categories of per se libel and slander. *Richard v. Gray*, Fla. S. Ct. 1953, 62 So. 2d 297, 298; *Layne v. Tribune*, 1933, 108 Fla. 177, 146 So. 234, 236; *Adams v. News-Journal Corp.*, Fla. S. Ct. 1955, 84 So. 2d 549, 551; *Miami Herald Pub. Co. v. Brautigan*, Fla. App. 1961, 127 So. 718, 722.

Libel per se is not limited to these four categories: Courts use a stock formula to describe a general class of per se libel (but not per se slander). The Restatement's formula is:

> One who publishes defamatory matter is subject to liability without proof of special harm or loss of reputation if the defamation is

[7] The district court granted the plaintiff leave to amend. The plaintiff stood by his contention that the publication was libelous per se.

> (a) Libel whose defamatory innuendo is apparent from the publication itself without reference to extrinsic facts by way of inducement. Restatement, Second, Tentative Draft 12, Section 569.

In Florida and in many states the rubric runs: a libel per se is "any publication which exposes a person to distrust, hatred, contempt, ridicule, obloquy". For example, in *Briggs v. Brown*, 55 Fla. 417, 46 So. 325, 330 (1908) the court states the formula for libels per se as follows:

> A civil action for libel will lie when there has been a false and unprivileged publication by letter or otherwise which exposes a person to distrust, hatred, contempt, ridicule, or obloquy . . . or which has a tendency to injure such person in his office, occupation, business, or employment. If the publication is false and not privileged, and is such that its natural and proximate consequence necessarily causes injury to a person in his personal, social, official, or business relations or life, wrong and injury are presumed and implied, and such publication is actionable per se.

This definition is in accord with earlier Florida cases and has been repeated with approval in many later decisions.[8]

B. There is no dispute between the parties as to these fundamental principles. The dispute centers about the district court's conclusion that "whether a given writing is or is not libelous per se is a question of law for the Court to determine". The court below

[8] *E.g.*, Metropolis Co. v. Croasdell, 145 Fla. 455, 199 So. 568, 569, (1941); Layne v. Tribune Co., 108 Fla. 177, 146 So.2d 234, 236 (1933); McClellan v. L'Engle, 74 Fla. 581, 77 So. 270, 272 (1917); McCormick v. Miami Herald Publ. Co., 139 So.2d 197, 200 (Fla. Dist. Ct. App. 1962).

found that Florida "appellate decisions do not disclose any clear statement that the existence of libel per se is a question for the Court and not for the jury, [but] the Court interprets cases [throughout the United States] as establishing this as a sub silentio proposition of Florida law".

We find that the general law and Florida law are in agreement with Dean Prosser's conclusion: "It is for the court *in the first instance* to determine whether the words are reasonably capable of a particular interpretation, or whether they are necessarily so; it is then for the jury to say whether they were in fact understood as defamatory. If the language used is open to two meanings . . . it is for the jury to determine whether the defamatory sense was the one conveyed." (Emphasis added.) Prosser, Law of Torts § 106, at 765 (1963). Similarly the Restatement, Second, Tentative Draft 12, Section 614, expresses the rule as follows:

> (1) The Court determines
>
> (a) Whether a communication is capable of bearing a particular meaning, and
>
> (b) Whether that meaning is defamatory.
>
> (2) The jury determines whether a communication, capable of a defamatory meaning, was so understood by its recipient.

Section 615 states:

> (1) The Court determines
>
> (a) Whether the defamatory meaning of libel is apparent from the publication itself without reference to extrinsic facts, and
>
> (b) Whether an imputation of crime or disease or of unchastity to a woman, is of such a character as to make libel or slander actionable without proof of special harm.

> (2) Subject to the control of the court whenever the issue arises, the jury determines whether language imputes to another conduct, characteristics or a condition incompatible with the proper conduct of his business, trade, profession or office.

Both judge and jury play a part in determining whether language constitutes libel. The Supreme Court has delineated these roles in *Washington Post Co. v. Chaloner*, 1919, 250 U.S. 290, 39 S.Ct. 448, 63 L.Ed. 987:

> A publication claimed to be defamatory must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it. . . . When thus read, if its meaning is so unambiguous as to reasonably bear but one interpretation, it is for the judge to say whether that signification is defamatory or not. If, upon the other hand, it is capable of two meanings, one of which would be libelous and actionable and the other not, it is for the jury to say, under all the circumstances surrounding its publication, including extraneous facts admissible in evidence, which of the two meanings would be attributed to it by those to whom it is addressed or by whom it may be read.

In most of the Florida cases relied upon by all of the parties to this suit the trial court disposed of the libel issue summarily, so that in those cases the role of the jury was not discussed on appeal.[9] In cases in which

[9] *E.g.*, Budd v. J. Y. Gooch Co., 27 So.2d 72 (Fla. 1964); Adams v. News-Journal Corp., 84 So.2d 549 (Fla. 1956); Walsh v. Miami Herald Publ. Co., 80 So.2d 669 (Fla. 1955); Richard v. Gray, 62 So.2d 597 (Fla. 1953); Commander v. Pedersen, 116 Fla. 148, 156 So. 337 (1934); O'Neal v. Tribune Co., 176 So.2d 535 (Fla. Dist. Ct. App. 1965); Hevey v. News-Journal Corp., 148 So.2d 543 (Fla. Dist. Ct. App. 1963). See also Summit v. Zetterlund, 287 Fed. 759 (S.D.Fla. 1923);

jury trials were had the appellate decisions do not reflect whether the issue of libel per se was submitted to the jury. However, in *Miami Herald Pub. Co. v. Brautigan*, Fla. App. 1961, 127 So. 2d 718, cert. denied, 35 So.2d 741, cert. denied 369 U.S. 821 (1962) the trial court submitted to the jury the question whether a news story criticizing a state attorney for "muzzling" the grand jury was libelous per se; the District Court of Appeal affirmed. Some Florida decisions have specifically referred to the jury's role in determining libel per se. See *Caldwell v. Cromwell-Collier Publ. Co.*, 5 Cir. 1947, 161 F.2d 333, 336 ("a jury might well conclude . . .") ; *Metropolis Co. v. Groasdell*, 145 Fla. 455, 199 So. 568, 570 (1941) ("the evidence adduced by the plaintiff, if believed by the jury . . .") ; *McClellan v. L'Engle*, 74 Fla 581, 77 So. 270, 273 (1917) ("the language used may or may not be, by a jury, considered. . . ."), but none of these cases involved the precise issue confronting this Court. In *Jones v. Greeley*, 25 Fla. 629, 6 So. 448, 450 (1885), the Florida Supreme Court approved the instruction, "It is a question for the jury to determine whether or not the alleged libel bears the construction which the plaintiff in his declaration seeks to put upon it. . . ."

C. The district court in this case completely excised the jury's role, a position it could take only on the assumption that the publication unambiguously carried no defamatory meaning. Since the court did not spell out its reasons, the defendants in their briefs have attempted to articulate the rationale for the holding below.

Grayson v. Savannah News-Press Inc., 110 Ga. App. 561, 139 S.E.2d 347, 351 (1964); Walker v. Sheehan, 80 Ga. App. 606, 56 S.E.2d 628, 632 (1949); Hermann v. Newark Morning Ledger Co., 49 N.J. 551, 140 A.2d 529, 530 (1958); Katapodis v. Brooklyn Spectator, 287 N.Y. 17, 38 N.E.2d 112 (1941); Appliance Buyers Credit Corp. v. Baxley, 241 S.C. 64, 127 S.E.2d 8, 10 (1962); Southern Publ. Co. v. Foster, 53 S.W.2d 1014, 1016 (Tex. Comm'n App. 1932); Frinzi v. Hanson, 30 Wis. 2d 271, 140 N.W.2d 259 (1966).

The defendants argue that the article did not "hurt" Belli as an attorney, did not imply that he was "losing his touch with demonstrative evidence", did not affect his ability to "obtain those 'more adequate awards' for seamen and railroad workers for which he is so justly famous". In effect, so the argument runs, the article was nothing more than caustic comment on the acuteness of the Florida Bar Association. Belli simply "showed the Florida lawyers that their agreement was somewhat more favorable to him that they — in their naivete — contemplated". In its harshest sense, they say, "the article implies no more than that Mr. Belli 'put one over' on the Florida Bar", which is "not quite the same as conning a destitute widow out of her homestead". In short, Mr. Belli just got "a little more out of the agreement than the Bar Association contemplated".

The defendants make a case — just barely — for the view that the article is capable of being reasonably interpreted as non-defamatory. But since the article on its face is also capable of carrying a defamatory meaning, it is for the jury to decide whether the words were in fact so understood.

The plaintiff contends, in his brief, "No person reading the headline and the article *sub judice* . . . could conclude other than that Melvin Belli, both as a lawyer and as a private citizen is grasping, conniving, contemptible, dishonest; a cheat, swindler, trickster, deceiver, defrauder; a person to be avoided, shunned and distrusted." Without benefit of the defendants cavalier reading of the article or the plaintiff's retort hyperbolic, the bare bones of the article are capable of carrying the meaning that Belli tricked and deceived the Florida Bar Association out of hundreds of dollars worth of clothes.

The story alleges: (1) Belli knew that the Florida Bar Association's budget would enable him to be reimbursed only for his hotel bill; (2) subject to this

limitation he agreed to participate in a panel discussion; (3) he deliberately planned to "take" the Association for hundreds of dollars by charging clothing purchases to his hotel bill; (4) he and his well-dressed wife left Miami before the Association found out about their purchases; (5) the Association, to its embarrassment, had to pick up the tab. "The Florida Bar had been taken. . . . After all that was the plan."

The author's comment seems intended to insure the common reader's understanding of what purportedly happened. The common reader is likely to understand "take", just as Miss Yothers must have understood it. A recent dictionary defines it: "To cheat, deceive";[10] other dictionaries agree with this definition.[11] The man in the street is likely to understand that hotel expenses do not include "hundreds of dollars worth of clothing". But any doubts the reader might have as to what purportedly happened are likely to be resolved by the reference to Belli's "plan" to "take" the Florida Bar. We hold that a jury might reasonably conclude that the conduct imputed to Belli was incompatible with the standards of an ethical lawyer and as such violated one of the four traditional categories of libel per se. A jury might also conclude that such con-

[10] The Reader's Digest Great Encyclopedia Dictionary 1365 (1967).

[11] See, for example, the *Dictionary of American Slang* 28 (1960) which defines "been taken" as "To have been taken advantage of, deceived, cheated or tricked, overcharged, sold misrepresented merchandise; swindled", or *Webster's Third New International Dictionary* 2330 (1966), which defines one of the meanings of the word "take" as "to impose upon, CHEAT, SWINDLE".

The seriousness of the charge of the newspaper article in this case, if interpreted by a jury as suggested by the above-cited possible dictionary definitions of one of the terms used therein, can be measured in part by reference to Rule 11.02 of the Integration Rules of the Florida Bar 3(a): "The commission by a lawyer of any act contrary to honesty, justice or good morals, whether the act is committed in the course of his re-

duct subjected Belli to contempt and ridicule humiliating him socially and injuring him professionally.

The Court has some doubt whether the publication in question carries a non-defamatory meaning. The Court has very little doubt that it carries a defamatory meaning. The Court has concluded however that the final determination of the issue of defamation should be made by a jury.

The story is nine years old. It was not made within the context of a discussion of an important public issue. Nevertheless, the delimiting effect of the law of libel on First Amendment rights and a free press impels the Court not to excise the role of the jury. "Since one's reputation is the view which others take of him . . . [w]whether an idea injures a person's reputation depends upon the opinions of those to whom it is published." "Developments in the Law: Defamation, 69 Harv. L. Rec. 875, 881-82 (1956). Thus, because it is impractical, even unreliable, to depend upon in-court testimony of recipients of the particular publication for determining whether that publication is defamatory, a logical function of the jury is to decide whether the plaintiff has been lowered in the esteem of those to whom the idea was published. As early as the seventeenth century, the court in *Lord Townshend v. Dr. Hughes*, 1693, 2 Mod. 150, 195, held that "words should not be construed in a rigid or in a mild sense, but according to the general and natural meaning, and agreeable to the common understanding of all men." Florida has adopted the common-mind test. *Loeb v. Geronemus*, Fla. 1953, 66 So. 2d 241. Any doubt as to the defamatory effect of a publication should be resolved by the common mind of the jury, and not by even the most carefully considered judicial pronouncement.

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lations as an attorney or otherwise . . . and whether or not the act is a felony or misdemeanor, constitutes a cause for discipline."

II.

Historically, the action for written defamation (libel) developed as a criminal action in the Star Chamber; the separate action for spoken defamation (slander) developed in the ecclesiastical courts. For the crime of libel, it was necessary to show harm only to the reputation; to recover on slander it was necessary to show pecuniary loss. The strict requirements for a slander action were rationalized on the ground that since libel is in a relatively permanent form and has a wider potential audience, pecuniary harm is so probable as to be presumed. See generally Veeder, *The History and Theory of the Law of Defamation*, 3 Colum. L. Rev. 546 (1903), 4 Colum. L. Rev. (1904). The difference between the law applicable to libel and that applicable to slander has been generally continued in the modern law of defamation. See Prosser, Law of Torts § 107 (1963); *Developments in the Law*: Defamation, 69 Harv. L. Rev. 876, 887 (1956); Harper and James, §§ 5.9, 5.10.

With slander, as with libel, certain defamatory words are actionable without proof of any actual damage to the plaintiff. These fall into the same categories of libel per se. *Pollard v. Lyon*, 91 U.S. 225, 226 (1875). This classification was accepted by the Florida Supreme Court in *Loeb v. Geronemus*, 66 So.2d 241, 244 (1953): "Only certain well defined classes of imputation as to crime, disease, particular unfitness for office, etc., or unchastity, have been deemed slanderous per se." Accord, e.g., *Campbell v. Jacksonville Kennel Club*, 66 So.2d 495 (Fla. 1953); *Carter v. Sterling*, 132 So.2d 430 (Fla. Dist. Ct. App. 1961). Any allegedly slanderous statements not falling within any of these categories may constitute slander per quod but are actionable only upon a showing of special damages. *Loeb v. Geronemus, supra; Carter v. Sterling, supra.* Belli has not complained of special damage by reason of Handley's statement.

In spite of language apparently limiting slander per se to four well-defined categories, Florida courts have adopted a broad view of what constitutes slander per se. In *Sharp v. Bussey*, 1939, 137 Fla. 96, 187 So. 779, 780, the court although emphasizing that "This action is for slander, not libel" quoted with approval the following language from *Briggs v. Brown*, 1908, 55 Fla. 417, 46 So. 325, 330, an action for libel and slander:

> Where a publication is false and not privileged, and is such that its natural and proximate consequence necessarily causes injury to a person in his personal, social, official or business relations of life, wrong and injury are presumed or implied and such publication is actionable per se.

Later cases approve this language. *Joopanenko v. Gavagan*, 67 So.2d 434 (Fla. 1953); *Carter v. Sterling*, 132 So. 2d 430 (Fla. Dist. Ct. App. 1961). In *Sharp* the defendant was alleged to have said that the plaintiff was at a Negro dance hall, dancing with Negro "wenches". The Court found that the statement made by the defendant, if false, would cause injury to the plaintiff "in his social, official and business relations of life" because the plaintiff would have been viewed as having forfeited "respect and confidence" of the community (Jacksonville, Duval County) and would have been held "in contempt" and have been "despised by self-respecting" white and Negro citizens.[12] In *Joopanenko*, the plaintiff alleged that the defendant, addressing a crowd and speaking of the plaintiff, said "Don't let that man speak, I know him and he is a Communist". The Supreme Court of Florida refused

[12] The Court in *Sharp* relied extensively on the *libel* case of Briggs v. Brown, 55 Fla. 417, 46 So. 325 (1908). Furthermore, in *Sharp* a possible ground for the Court's holding, and one alluded to at least indirectly, was the injury to the plaintiff in his official capacity as mayor. This would place the case within one of the traditional categories of slander per se.

to decide whether the statement accused the plaintiff of having committed a crime, 67 So. 2d at 437, and did not mention any effect of the statement on the plaintiff's business or profession. Instead, the Court held that "Such words hold him up to scorn, contempt and ridicule, causing such person to be shunned by his neighbors. . . ." In Florida then, the scope of a general class of slander per se includes statements holding another up to "scorn, contempt, and ridicule".

Handley's oral statement to Yothers, as it is repeated in the record, does not contain all of the derogatory language of the printed column. There is no reference to a "plan" to "take" the Florida Bar Association. Handley referred to $300 of purchases, not to hundreds of dollars of clothing bills. The difference is in degree. We hold that it is for the jury to decide whether his account of the story was defamatory.

III.

Belli charges a conspiracy among Orlando Daily Newspapers, Inc., the Evening Star editor Martin Andersen, Jean Andersen, and other unnamed persons and corporations (but not Handley) to abuse, discredit, and vilify Belli through publication of the libelous article. The district court dismissed the conspiracy count as being too vague and indefinite to state a claim upon which relief may be granted. This dismissal is in error in light of our holding on the alleged libel.

In *Loeb v. Geronemus*, 66 So.2d 241, 243 (Fla. 1953), the court stated that "whether the complaint . . . alleges facts sufficient to state a cause of action [for conspiracy] must be determined from the standpoint of whether the complaint states a cause of action in either libel or slander." Additionally, the Florida Court of Appeals, referring to an earlier Supreme Court decision, observed that "A complaint alleging

conspiracy . . ., an overt act done in pursuance with the conspiracy and damages resulting from such overt act was held to contain all the essential elements of a malicious conspiracy." *Reagan v. Davis*, 97 So.2d 324, 327 (Fla. Dist. Ct. App. 1957). Since the alleged libel in the present case is actionable, the complaint alleging the conspiracy, the publication of the libelous article, and damages resulting therefrom is sufficient to state a cause of action.

IV.

The defendants, relying on *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and the appellate decision in *Curtis Publ. Co. v. Butts*, 5 Cir. 1965, 351 F.2d 705, *aff'd* U.S. , 87 S.Ct. , 18 L.Ed.2d 1092, and other lower court and appellate decisions,[13] assert that even if false the article in the Evening Star was a privileged commentary concerning a public figure; thus, if published without malice, the article could not give rise to liability for libel.

The New York Times doctrine has been expanded by the Supreme Court to encompass reporting of conduct of "public figures". *Curtis Publ. Co. v. Butts*, 1967, U.S. , 87 S.Ct. , 18 L.Ed2d 1092. Edwin A. Walker, commander of the federal troops during the school segregation confrontation at Little Rock in 1957 and an outspoken advocate against federal intervention in such matters, Coach Wallace Butts, one-time head football coach at the University of Georgia, and Linus Pauling,[14] scholar, scientist, and winner of two Nobel Prizes, have been classified as "public figures". Not only must Belli be considered

[13] Walker v. Courier-Journal & Louisville Times Co., 5 Cir., 1966, 368 F.2d 189, *reversing* 245 F. Supp. 231 (W.D. Ky. 1965); Pauling v. Globe-Democrat Publ. Co., 8 Cir. 1966, 362 F.2d 188; Pauling v. National Review, Inc., 269 N.Y.S. 2d 11 (Sup. Ct. 1966).

[14] See Pauling v. Globe-Democrat Publ. Co., 8 Cir. 1966, 362 F.2d 188.

a public figure before the defendants can avail themselves of the *New York Times* privilege; the matter covered by the publication must be of legitimate and substantial public interest. Thus a court confronted with a defamation suit in which the defendant asserts the *New York Times* privilege is compelled to make the dual inquiry (1) whether the plaintiff is a public figure and (2) whether the alleged defamatory publication is directed towards his public conduct. In most cases it is a relatively simple matter to determine whether the plaintiff is a public *official* and whether the defamatory comment is directed toward his *official* capacity. But in the case of a public *figure* there is substantially more room for the interplay of facts concerning his entry into the public arena and the nature of the issue in which he has become embroiled. We conclude, therefore, that the trial court is the proper arena for development of the relevant facts and resolution of the crucial issues in the first instance.[15]

Although it may be conceded that the event purportedly covered by the Evening Star article was not a "public issue" or "public event", it may have been a matter of "public interest".[16] *New York Times v. Sullivan, supra. Garrison v. Louisiana*, 1964, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125. We recognize, how-

[15] Cf. Rosenblatt v. Baer, 1966, 383 U.S. 75, 88, 86 S. Ct. 669, 15 L.Ed.2d 597. "[A]s is the case with questions of privilege generally, it is for the trial judge in the first instance to determine whether the proofs show respondent to be a 'public official.'"

[16] See generally Comment, Defamation of the Public Official, 61 Nw. U. L. Rev. 614 (1966); Comment, The Scope of First Amendment Protection for Good-Faith Defamatory Error, 75 Yale L.J. 642 (1966); Note, Free Speech and Defamation of Public Persons. The Expanding Doctrine of New York Times Co. v. Sullivan, 52 Corn. L. Q. 419 (1967), Supreme Court, 1966 Term, 81 Harv. L. Rev. 69, 160 (1967). The danger of adopting a circular definition of the scope of the New York Times privilege is discussed in the Supreme Court, 1966 Term, supra at 168.

ever, that we are here confronted with a case where the event reported was some nine years old and was reported in a gossip column. As the majority in *Rosenblatt v. Baer, supra* n. 15 at 87, recognized concerning libel of a public official, "To be sure, there may be cases where a person is so far removed from a former position of authority that comment on the manner in which he performed his responsibilities no longer has the interest necessary to justify the New York Times rule." Furthermore, in a number of cases, some involving invasions of privacy, the privilege established in *New York Times* was not extended to public figures in circumstances concerning conduct or speech, however current, on matters of little or no public import.[17] We must leave it to the trial court, therefore, to determine whether Belli "was a public man in whose public conduct society and the press had a legitimate and substantial interest." *Curtis Publ. Co. v. Butts*, U.S. at , 87 S.Ct. at , 18 L.Ed.2d at 1117 (Warren, C. J., concurring).

The opinion of Mr. Justice Harlan, joined by three other members of the Court, in the combined cases of *Walker* and *Butts* adopts a more narrow view of the privilege regarding defamation of public figures than that set out in *New York Times* regarding defamation of public officials.[18] A majority of the Court, however, extended the *New York Times* standards to encompass public figures. The Court in *New York*

[17] Lorillard v. Field Enterprises, Inc., 65 Ill. App. 2d 65, 213 N.E.2d 1, 7 (1965) (socialite); Faulk v. Aware, Inc., 14 N.Y.2d 954, 253 N.Y.S.2d 990, 202 N.E.2d 372 (1964), *cert. denied*, 380 U.S. 916 (radio and television performer); Dempsey v. Time, Inc., 43 Misc.2d 754, 252 N.Y.S.2d 186, 189 (Sup. Ct. 1964), aff'd, 254 N.Y.S.2d 80 (1964) (prizefighter); Spahn v. Julian Messner, Inc., 43 Misc. 2d 219, 250 N.Y.S.2d 529, 535 (Sup.Ct. 1964), aff'd, 260 N.Y.S.2d 451 (1965) (baseball pitcher).

[18] Compare the New York Times standard with the standard stated in Mr. Justice Harlan's opinion, U.S. :

> We consider and would hold that a "public figure" who is not a public official may also recover damages for a defama-

Times required "convincing clarity" of the proof presented to show actual malice, 376 U.S. at 285-86 (and found it lacking in that case); however, this requirement extends only to the proof required to meet the constitutional demands. As to the *complaint*, the Federal Rules of Civil Procedure require only that "Malice, intent, knowledge, and other condition of mind of a person . . . be averred generally." Rule 9(b). In his amended complaint Belli charged the defendants with actual malice in publication of the allegedly libelous article. This charge then, is sufficient on its face to establish a basis for a showing of actual malice by defendants in the perpetration of the alleged libel, as required by the *New York Times* decision.

We REVERSE the dismissal of the district court and REMAND the case for further proceedings consistent with this opinion.

GODBOLD, Circuit Judge, specially concurring:

I agree that the district court erred in dismissing the plaintiff's complaint for failure to state a claim upon which relief could be granted. But as to some of the principles that will guide the district court in further proceedings, my views differ from those stated in the careful and scholarly opinion of the majority.

There are two aspects to the complex problem of defining the provinces of judge and jury in a defamation case. The first involves a determination whether the publication complained of falls within one of the four categories which permit an action to be maintained without allegation or proof of special damages. Although the matter is not free from doubt, in Florida this question seems to be one for the court. *McCormick*

tory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.

But see Rose v. Koch, Minn. Sup. Ct. 1967, 36 U.S.L.W. 2239, which interprets *Butts* as setting out separate standards for public officials and public figures.

v. Miami Herald Publishing Co., 139 So. 2d. 197 (Fla. App. 1962); see *Adams v. News-Journal Corp.*, 84 So. 2d 549 (Fla. 1955). Compare *Miami Herald Publishing Co. v. Brautigam*, 127 So. 2d 718 (Fla. App. 1961). The second concerns whether the published statement is defamatory. On this point there is general agreement that it is for the judge in the first instance to determine whether the words are capable of defamatory meaning; if so it becomes the duty of the jury to decide whether they are defamatory in fact. 1 Harper & James, Torts § 5.29 (1956); Prosser, Torts § 106 (3d ed. 1964). This does not preclude the judge from ruling, in an appropriate case, that the meaning of the publication is so unambiguous when construed in the sense in which ordinary readers would understand it that it is defamatory as a matter of law. *Washington Post Co. v. Chaloner*, 250 U.S. 290, 39 S.Ct. 448, 63 L.Ed. 987 (1919). "If the article standing alone is plainly libelous, or manifestly wanting in any defamatory meaning, it is the duty of the court to declare either way and instruct the jury accordingly." Newell, Slander & Libel 362 (3d ed. 1914). I fail to see any way in which reasonable men could construe the statements, oral and written, in this case in a nondefamatory sense, and would therefore hold them defamatory as a matter of law. The expressed doubt of the majority whether the newspaper statements could carry a non-defamatory meaning is but little less firm than my view. The role of the jury is not to be excised. Nor is that of judges. If the content of language is defamatory beyond cavil, freedom does not call for allowing the defamer to make a second attack on the victim's reputation, though done in a judicial atmosphere, on the theory of showing that to the common mind the victim has not suffered in esteem. Judges deal regularly with questions of what ordinary and reasonable people do and think, in the field of constitutional liberties as well as elsewhere, and the properly exercisable judicial role is not diminished on the ground that reputation is what is injured.

In the United States Court of Appeals for the Fifth Circuit

October Term, 1966

No. 23623

D. C. Docket No. 64-131-Orl-Civil Action

MELVIN M. BELLI,
Appellant,

versus

ORLANDO DAILY NEWSPAPERS, INC., ET AL.,
Appellees.

Appeals from the United States District Court for the Middle District of Florida.

Before WISDOM and GODBOLD, Circuit Judges, and McRAE, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby remanded to the said District Court for further proceedings consistent with the opinion of this Court;

It is further ordered and adjudged that the appellees, Orlando Daily Newspapers, Inc., and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

December 28, 1967

GODBOLD, Circuit Judge, specially concurs.

Issued as Mandate: FEB. 28, 1968

Court Costs:

Docketing cause, etc.	$ 25.00
Costs of Printing Record	$292.50
Total	$317.50

In the United States Court of Appeals for the Fifth Circuit

No. 23623

MELVIN M. BELLI,
Appellant,

versus

ORLANDO DAILY NEWSPAPERS, INC., ET AL.,
Appellees.

Appeal from the United States District Court for the Middle District of Florida

ON PETITION FOR REHEARING EN BANC
(February 16, 1968)

Before WISDOM and GODBOLD, Circuit Judges, and McRAE, District Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule (25)a, subpar. (b), the Petition for Rehearing En Banc is DENIED.

APPENDIX B

Supreme Court of the United States

Nos. 37 and 150. — OCTOBER TERM, 1966

37	Curtis Publishing Co., *Petitioner* v. Wallace Butts.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
150	The Associated Press, *Petitioner* v. Edwin A. Walker.	On Writ of Certiorari to the Court of Civil Appeals of Texas.

[June 12, 1967.]

MR. JUSTICE HARLAN announced the judgments of the Court and delivered an opinion in which MR. JUSTICE CLARK, MR. JUSTICE STEWART, and MR. JUSTICE FORTAS join.*

In *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280, this Court held that "[t]he constitutional guarantees [of freedom of speech and press] require ... a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not." We brought

* Five members of the Court, while concurring in the result reached in No. 150, would rest decision on grounds other than those stated in this opinion. See separate opinions of THE CHIEF JUSTICE (*post*, p —), of MR. JUSTICE BRENNAN (*post*, p. —), and of MR. JUSTICE BLACK (*post*, p. —).

these two cases here, 385 U.S. 811, 385 U.S. 812, to consider the impact of that decision on libel actions instituted by persons who are not public officials, but who are "public figures" and involved in issues in which the public has a justified and important interest. The sweep of the *New York Times* rule in libel actions brought under state law was a question expressly reserved in that case, 376 U.S. 283, n. 23, and while that question has been involved in later cases, *Garrison v. Louisiana*, 379 U.S. 64; *Rosenblatt v. Baer*, 383 U.S. 75; *Time, Inc. v. Hill*, 385 U.S. 374, it has not been fully settled.

The matter has, however, been passed on by a considerable number of state and lower federal courts and has produced a sharp division of opinion as to whether the *New York Times* rule should apply only in actions brought by public officials or whether it has a longer reach. Compare, *e. g.*, *Pearson v. Fairbanks Publishing Co.*, 413 P.2d 711 (Alaska), with *Clark v. Pearson*, 248 F. Supp. 188.[1] The resolution of the uncertainty in this area of libel actions requires, at bottom, some further exploration and clarification of the

[1] See also *Afro-American Publishing Co. v. Jaffe*, 366 F.2d 649, — U.S. App. D.C. —; *Washington Post Co. v. Keogh*, 365 F.2d 965, — U.S. App. D.C. —; *Pauling v. Globe Democrat Publishing Co.*, 362, F.2d 188; *Pape v. Time, Inc.*, 354 F.2d 558; *Pauling v. News Syndicate Co., Inc.*, 335 F.2d 659; *Fignole v. Curtis Publishing Co.*, 247 F.Supp. 595; *Walker v. Courier-Journal & Louisville Times Co.*, 246 F.Supp. 231; *United Medical Labs v. CBS, Inc.*, 228 F.Supp. 735; *Klahr v. Winterble*, 4 Ariz. App. 158, 418 P.2d 404; *Walker v. Associated Press*, 417 P.2d 486 (Colorado); *Powell v. Monitor Publishing Co., Inc.*, 107 N.H. 83, 217 A.2d 196; *Eadie v. Pole*, 191 N.J. Super 504, 221 A.2d 547; *State v. Browne*, 86 N.J. Super. 217, 206 A.2d 591; *People v. Mager*, 25 App. Div. 2d 363, 269 N.Y.S.2d 848; *Gilberg v. Goffi*, 21 App. Div. 2d 517, 251 N.Y.S.2d 823; *Krutech v. Schimmel*, 50 Misc. 2d 1052, 272 N.Y.S.2d 261; *Cabin v. Community Newspapers, Inc.*, 50 Misc. 2d 574, 270 N.Y.S.2d 913; *Pauling v. National Review*, 49 Misc. 2d 975, 269 N.Y.S.2d 11; *Block v. Benton*, 44 Misc. 2d 1053, 255 N.Y.S.2d 767; *Fegley v. Morthimer*, 204 Pa. Super. 54, 202 A.2d 125; *Tucker v. Kilgore*, 388 S.W.2d 112 (Ky.).

relationship between libel law and the freedom of speech and press, lest the "New York Times Rule" become a talisman which gives the press constitutionally adequate protection only in a limited field, or, what would be equally unfortunate, one which goes far to immunize the press from having to make just reparation for the infliction of needless injury upon honor and reputation through false publication. These two libel actions, although they arise out of quite different sets of circumstances, provide that opportunity. We think they are best treated together in one opinion.

I.

No. 37, *Curtis Publishing Co. v. Butts*, stems from an article published in petitioner's Saturday Evening Post which accused respondent of conspiring to "fix" a football game between the University of Georgia and the University of Alabama, played in 1962. At the time of the article, Butts was the athletic director of the University of Georgia and had overall responsibility for the administration of its athletic program. Georgia is a state university, but Butts was employed by the Georgia Athletic Association, a private corporation, rather than by the State itself.[2] Butts had previously served as head football coach of the University and was a well-known and respected figure in coaching ranks. He had maintained an interest in coaching and was negotiating for a position with a professional team at the time of publication.

The article was entitled "The Story of a College Football Fix" and prefaced by a note from the editors

[2] In *Allen v. Regents of the University System of Georgia*, 304 U.S. 439, this Court described the Athletic Association as a body carrying on "a business comparable in all essentials to those usually conducted by private owners." *Id.* at 451. Section 32-153 of the Georgia Code specifically provides that athletic associations are not to be considered agencies of the State.

stating: "Not since the Chicago White Sox threw the 1919 World Series has there been a sports story as shocking as this one . . . Before the University of Georgia played the University of Alabama . . . Wally Butts . . . gave [to its coach] . . . Georgia's plays, defensive patterns, all the significant secrets Georgia's football team possessed." The text revealed that one George Burnett, an Atlanta insurance salesman, had accidentally overheard, because of electronic error, a telephone conversation between Butts and the head coach of the University of Alabama, Paul Bryant, which took place approximately one week prior to the game. Burnett was said to have listened while "Butts outlined Georgia's offensive plays . . . and told . . . how Georgia planned to defend . . . Butts mentioned both players and plays by name." The readers were told that Burnett had made notes of the conversation, and specific examples of the divulged secrets were set out.

The article went on to discuss the game and the players' reaction to the game, concluding that "[t]he Georgia players, their moves analyzed, and forecast like those of rats in a maze, took a frightful physical beating," and said that the players, and other sideline observers were aware that Alabama was privy to Georgia's secrets. It set out the series of events commencing with Burnett's later presentation of his notes to the Georgia head coach, Johnny Griffith, and culminating in Butts' resignation from the University's athletic affairs, for health and business reasons. The article's conclusion made clear its expected impact:

> "The chances are that Wally Butts will never help any football team again . . . The investigation by university and Southeastern Conference officials is continuing; motion pictures of other games are being scrutinized; where it will end no one so far can say. But careers will be ruined, that is sure."

Butts brought this diversity libel action in the federal courts in Georgia seeking $5,000,000 compensa-

tory and $5,000,000 punitive damages. The complaint was filed, and the trial completed, before this Court handed down its decision in *New York Times*, and the only defense raised by petitioner Curtis was one of substantial truth. No constitutional defenses were interposed although Curtis' counsel were aware of the progress of the *New York Times* case, and although general constitutional defenses had been raised by Curtis in a libel action instituted by the Alabama coach who was a state employee.

Evidence at trial was directed both to the truth of the article and to its preparation. The latter point was put in issue by the claim for punitive damages which required a finding of "malice" under Georgia law. The evidence showed that Burnett had indeed overheard a conversation between Butts and the Alabama coach, but the content of that conversation was hotly disputed. It was Butts' contention that the conversation had been general football talk and that nothing Burnett had overheard would have been of any particular value to an opposing coach. Expert witnesses supported Butts by analyzing Burnett's notes and the films of the game itself. The Saturday Evening Post's version of the game and of the players' remarks about the game was severely contradicted.

The evidence on the preparation of the article, on which we shall focus in more detail later, cast serious doubt on the adequacy of the investigation underlying the article. It was Butts' contention that the magazine had departed greatly from the standards of good investigation and reporting and that this was especially reprehensible, amounting to reckless and wanton conduct in light of the devastating nature of the article's assertions.

The jury was instructed that in order for the defense of truth to be sustained it was "necessary that the truth be substantially portrayed in those parts of the article which libel the plaintiff." The "sting of the

libel" was said to be "the charge that the plaintiff rigged and fixed the 1962 Georgia-Alabama game by giving Coach Bryant [of Alabama] information which was calculated to or could have affected the outcome of the game." The jury was also instructed that it could award punitive damages "to deter the wrong-doer from repeating the trespass" in an amount within its sole discretion if it found that actual malice had been proved.[3]

The jury returned a verdict for $60,000 in general damages and for $3,000,000 punitive damages. The trial court reduced the total to $460,000 by remittitur. Soon thereafter we handed down our decision in *New York Times* and Curtis immediately brought it to the attention of the trial court by a motion for new trial. The trial judge rejected Curtis' motion on two grounds. He first held that *New York Times* was inapplicable because Butts was not a public official. He also held that "there was ample evidence from which a jury could have concluded that there was reckless disregard by defendant of whether the article was false or not."

Curtis appealed to the Court of Appeals for the Fifth Circuit which affirmed the judgment of the District Court by a two-to-one vote. The majority there did not reach the merits of petitioner's constitutional claim, holding that Curtis had "clearly waived any right it may have had to challenge the verdict and judgment on any of the constitutional grounds asserted in Times," 351 F.2d 702, 713, on the basis of *Michel v.*

[3] Actual malice was defined by the charge as encompassing "the notion of ill will, spite, hatred and an intent to injure one. Malice also denotes a wanton or reckless indifference or culpable negligence with regard to the rights of others." The jury was told that whether "actual malice or wanton or reckless indifference has been established must be determined from all of the evidence in the case." The trial court then directed the jury's attention to the circumstances of preparation. The impact of the charge is considered in more detail at pp. 23-25, *infra*.

Louisiana, 350 U.S. 91. It found Curtis chargeable with knowledge of the constitutional limitations on libel law at the time it filed its pleadings below because of its "interlocking battery of able and distinguished attorneys" some of whom were involved in the *New York Times* litigation. This holding rendered the compensatory damage decision purely one of state law and no error was found in its application. Turning to the punitive damage award, the majority upheld it as stemming from the "enlightened conscience" of the jury as adjusted by the lawful action of the trial judge. It was in "complete accord" with the trial court's determination that the evidence justified the finding "that what the Post did was done with reckless disregard of whether the article was false or not." 351 F.2d, at 719.

Judge Rives dissented, arguing that the record did not support a finding of knowing waiver of constitutional defenses. He concluded that the *New York Times* rule was applicable because Butts was involved in activities of great interest to the public. He would have reversed because "the jury might well have understood the district court's charge to allow recovery on a showing of intent to inflict harm or even the culpably negligent infliction of harm, rather than the intent to inflict harm through falsehood . . . ." 351 F.2d, at 723.

Rehearing was denied, 351 F.2d 733, and we granted certiorari, as indicated above. For reasons given below, we would affirm.

II.

No. 150, *Associated Press v. Walker*, arose out of the distribution of a news dispatch giving an eyewitness account of events on the campus of the University of Mississippi on the night of September 30, 1962, when a massive riot erupted because of federal efforts to enforce a court decree ordering the enrollment of a Negro, James Meredith, as a student in the University. The

dispatch stated that respondent Walker, who was present on the campus, had taken command of the violent crowd and had personally led a charge against federal marshals sent there to effectuate the court's decree and to assist in preserving order. It also described Walker as encouraging rioters to use violence and giving them technical advice on combating the effects of tear gas.

Walker was a private citizen at the time of the riot and publication. He had pursued a long and honorable career in the United States Army before resigning to engage in political activity, and had, in fact, been in command of the federal troops during the school segregation confrontation at Little Rock, Arkansas, in 1957. He was acutely interested in the issue of physical federal intervention, and had made a number of strong statements against such action which had received wide publicity. Walker had his own following, the "Friends of Walker," and could fairly be deemed a man of some political prominence.

Walker initiated this libel action in the state courts of Texas, seeking a total of $2,000,000 in compensatory and punitive damages. Associated Press raised both the defense of truth and constitutional defenses. At trial both sides attempted to reconstruct the stormy events on the campus of the University of Mississippi. Walker admitted his presence on the campus and conceded that he had spoken to a group of students. He claimed, however, that he had counseled restraint and peaceful protest, and exercised no control whatever over the crowd which had rejected his plea. He denied categorically taking part in any charge against the federal marshals.

There was little evidence relating to the preparation of the news dispatch. It was clear, however, that the author of this dispatch, Van Savell, was actually present during the events described and had reported them almost immediately to the Associated Press office in Atlanta. A discrepancy was shown between an oral

account given the office and a later written dispatch, but it related solely to whether Walker had spoken to the group before or after approaching the marshals. No other showing of improper preparation was attempted, nor was there any evidence of personal prejudice or incompetency on the part of Savell or the Associated Press.

The jury was instructed that an award of compensatory damages could be made if the dispatch was not substantially true,[4] and that punitive damages could be added if the article was actuated by "ill will, bad or evil motive, or that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person to be affected by it."

A verdict of $500,000 compensatory damages and $300,000 punitive damages was returned. The trial judge, however, found that there was "no evidence to support the jury's answers that there was actual malice" and refused to enter the punitive award. He concluded that the failure further to investigate the minor discrepancy between the oral and written versions of the incident could not "be construed as that *entire want of care* which would amount to a *conscious indifference* [*sic*] to the rights of plaintiff. Negligence, it may have been; malice, it was not. Moreover, the mere fact that AP permitted a young reporter to cover the story of the riot is not evidence of malice." The trial judge also noted that this lack of "malice" would require a verdict for the Associated Press if *New York Times* were applicable. But he rejected its applicability since there were "no compelling reasons of public policy requiring additional defenses to suits for libel. Truth alone should be an adequate defense."

Both sides appealed and the Texas Court of Civil Appeals affirmed both the award of compensatory dam-

[4] Two particular statements were at issue, the remark that "Walker assumed command of the crowd," and the accusation that Walker led a charge against the marshals.

ages and the striking of punitive damages. It stated without elaboration that *New York Times* was inapplicable. As to the punitive damage award, the plea for reinstatement was refused because "[i]n view of all the surrounding circumstances, the rapid and confused occurrence of events on the occasion in question, and in light of all the evidence, we hold that appellee failed to prove malice . . . ." 393 S. W. 2d 671, 683.

The Supreme Court of Texas denied a writ of error, and we granted certiorari, as already indicated. For reasons given below, we would reverse.

III.

Before we reach the constitutional arguments put forward by the respective petitioners, we must first determine whether Curtis has waived its right to assert such arguments by failing to assert them before trial. As our dispositions of *Rosenblatt v. Baer*, *supra*, and other cases involving constitutional questions indicate,[5] the mere failure to interpose such a defense prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground. Of course it is equally clear that even constitutional objections may be waived by a failure to raise them at a proper time, *Michel v. Louisiana*, *supra*, at 99,[6] but an effective waiver must, as was said in *Johnson v. Zerbst*, 304 U.S. 458, 464, be one of a "known right or privilege."

Butts makes two arguments in support of his contention that Curtis' failure to raise constitutional defenses amounted to a knowing waiver. The first is that the general state of the law at the time of this trial was such that Curtis should, in the words of the Fifth Circuit majority, have seen "the handwriting on the wall." 351 F.2d 734. We cannot accept this contention. Al-

[5] See *Tehan v. Shott*, 382 U.S. 406, 409, n. 3; *Linkletter v. Walker*, 381 U.S. 618, 622-629; *Griffin v. California*, 380 U.S. 609; *White v. Maryland*, 373 U.S. 59.

[6] See also *Ackermann v. United States*, 340 U.S. 193, 198.

though our decision in *New York Times* did draw upon earlier precedents in state law, *e. g.*, *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281, and there were intimations in a prior opinion and the extra-judicial comments of one Justice,[7] that some applications of libel law might be in conflict with the guarantees of free speech and press, there was strong precedent indicating that civil libel actions were immune from general constitutional scrutiny.[8] Given the state of the law prior to our decision in *New York Times*, we do not think it unreasonable for a lawyer trying a case of this kind, where the plaintiff was not even a public official under state law, to have looked solely to the defenses provided by state libel law. Nor do we think that the previous grant of certiorari in *New York Times* alone indicates a different conclusion. The questions presented for review there were premised on Sullivan's status as an elected public official, and elected officials traditionally have been subject to special rules of libel law.[9]

Butts' second contention is that whatever defenses might reasonably have been apparent to the average

[7] In *Beauharnais v. Illinois*, 343 U.S. 250, the Court had upheld an Illinois group libel statute but the majority had warned that " 'While this Court sits' it retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel." *Id.*, at 263-264. There were also four vigorous dissenters to the holding in that case. An article appearing in the June 1962 NYU Law Review had quoted MR. JUSTICE BLACK as believing that "there should be no libel or defamation law in the United States. . . ." Cahn, Justice Black and First Amendment "Absolutes"; A Public Interview, 7 N.Y.U.L. Rev. 549, 557.

[8] In *Robertson v. Baldwin*, 165 U.S. 275, 281, the Court said: "Thus the freedom of speech and of the press (art. 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation. . . ." That sentiment was repeated in a number of cases including *Beauharnais v. Illinois*, *supra*, n. 7. See *Near v. Minnesota*, 283 U.S. 697, 715; *Chaplinsky v. New Hampshire*, 315 U.S. 568.

[9] See, *e.g.*, *Sweeney v. Patterson*, 128 F.2d 457, 76 U.S. App. D.C. 23; *Hendrix v. Mobile Register*, 202 Ala. 616, 81 So. 558.

lawyer, some of Curtis' trial lawyers were involved in the *New York Times* litigation and thus should have been especially alert to constitutional contentions. This was the argument which swayed the Court of Appeals, but we do not find it convincing.

First, as a general matter, we think it inadvisable to determine whether a "right or privilege" is "known" by relying on information outside the record concerning the special legal knowledge of particular attorneys. Second, even a lawyer fully cognizant of the record and briefs in the *New York Times* litigation might reasonably have expected the resolution of that case to have no impact on this litigation, since the arguments advanced there depended so heavily on the analogy to seditious libel. We think that it was our eventual resolution of *New York Times*, rather than its facts and the arguments presented by counsel, which brought out the constitutional question here. We would not hold that Curtis waived a "known right" before it was aware of the *New York Times* decision. It is agreed that Curtis' presentation of the constitutional issue after our decision in *New York Times* was prompt.

Our rejection of Butts' arguments is supported by factors which point to the justice of that conclusion. See *Hormel v. Helvering*, 312 U.S. 552, 556-557. Curtis' constitutional points were raised early enough so that this Court has had the benefit of some ventilation of them by the courts below. The resolution of the merits of Curtis' contentions by the District Court makes it evident that Butts was not prejudiced by the time at which Curtis raised its argument, for it cannot be asserted that an earlier interposition would have resulted in any different proceedings below.[10] Finally the

[10] Even after our decision in *New York Times* was before him, the trial judge held it inapplicable. It is almost certain that he would have rebuffed any effort to interpose general constitutional defenses at the time of trial. See Note, Waiver of a Previously Unrecognized Defense: Must Lawyers Be Seers? 114 U.Pa.L.Rev. 451.

constitutional protection which Butts contends that Curtis has waived safeguards a freedom which is the "matrix, the indispensable condition, of nearly every other form of freedom." *Palko v. Connecticut*, 302 U.S. 319, 327. Where the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom, we are unwilling to find waiver in circumstances which fall short of being clear and compelling. Cf. *New York Times Co. v. Connor*, 365 F.2d 567, 572.

IV.

We thus turn to a consideration, on the merits, of the constitutional claims raised by Curtis in *Butts* and by the Associated Press in *Walker*. Powerful arguments are brought to bear for the extension of the *New York Times* rule in both cases. In *Butts* it is contended that the facts are on all fours with those of *Rosenblatt v. Baer*, *supra*, since Butts was charged with the important responsibility of managing the athletic affairs of a state university. It is argued that while the Athletic Association is financially independent from the State and Butts was not technically a state employee, as was Baer, his role in state administration was so significant that this technical distinction from *Rosenblatt* should be ignored. Even if this factor is to be given some weight, we are told that the public interest in education in general, and in the conduct of the athletic affairs of educational institutions in particular, justifies constitutional protection of discussion of persons involved in it equivalent to the protection afforded discussion of public officials.

A similar argument is raised in the *Walker* case where the important public interest in being informed about the events and personalities involved in the Mississippi riot is pressed. In that case we are also urged to recognize that Walker's claims to the protection of libel laws are limited since he thrust himself into the "vortex" of the controversy.

We are urged by the respondents, Butts and Walker, to recognize society's "pervasive and strong interest

in preventing and redressing attacks upon reputation," and the "important social values which underlie the law of defamation." *Rosenblatt v. Baer, supra*, at 86. It is pointed out that the publicity in these instances was not directed at employees of government and that these cases cannot be analogized to seditious libel prosecutions. *Id.*, at 92 (STEWART, J., concurring). We are told that "[t]he rule that permits satisfaction of the deep-seated need for vindication of honor is not a mere historic relic, but promotes the law's civilizing function of providing an acceptable substitute for violence in the settlement of disputes," *Afro-American Pub. Co. v. Jaffe*, 366 F.2d 649, 660, — U.S. App. D.C. —, —, and that:

> "Newspapers, magazines and broadcasting companies are businesses conducted for profit and often make vary large ones. Like other enterprises that inflict damage in the course of performing service highly useful to the public . . . they must pay the freight; and injured persons should not be relegated [to remedies which] make collection of their claims difficult or impossible unless strong policy considerations demand." *Buckley v. New York Post Corp.*, 373 F.2d 175, 182.

We fully recognize the force of these competing considerations and the fact that an accommodation between them is necessary not only in these cases, but in all libel actions arising from a publication concerning public issues. In *Time, Inc. v. Hill, supra*, at 388, we held that "[t]he guarantees for speech and press are not the preserve of political expression or comment upon public affairs . . ." and affirmed that freedom of discussion "must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102. This carries out the intent of the founders who felt that a free press would advance "truth, science, morality and arts in

general" as well as responsible government. Address to the People of Quebec, 1 Journals of the Continental Cong. 108. From the point of view of deciding whether a constitutional interest of free speech and press is properly involved in the resolution of a libel question a rational distinction "cannot be founded on the assumption that criticism of private citizens who seek to lead in the determination of .... policy will be less important to the public interest than will criticism of government officials." *Pauling v. Globe Democrat Pub. Co.*, 362 F.2d 188, 196.

On the other hand, to take the rule found appropriate in *New York Times* to resolve the "tension" between the particular constitutional interest there involved and the interests of personal reputation and press responsibility, *Rosenblatt v. Baer, supra,* at 86, as being applicable throughout the realm of the broader constitutional interest, would be to attribute to this aspect of *New York Times* an unintended inexorability at the threshold of this new constitutional development. In *Time, Inc. v. Hill, supra,* at 390, we counseled against "blind application of *New York Times Co. v. Sullivan*" and considered "the factors which arise in the particular context." Here we must undertake a parallel evaluation.[11]

The modern history of the guarantee of freedom of speech and press mainly has been one of a search for the outer limits of that right. From the fountainhead opinions of Justices Holmes and Brandeis in *Schenck, Abrams,* and *Whitney,*[12] which considered the problem when the disruptive effects of speech might strip the protection from the speaker, to our recent decision in

[11] The majority opinion in *Time, Inc. v. Hill,* 385 U.S. 374, was limited to the consideration of nondefamatory matter. *Id.,* at 391.

[12] *Schenck v. United States,* 249 U.S. 47 (Holmes, J.); *Abrams v. United States,* 250 U.S. 616, 624 (Holmes, J., dissenting); *Whitney v. California,* 274 U.S. 357, 372 (Brandeis, J., concurring).

Adderley v. Florida, 385 U.S. 39, where we found the freedom of speech not to include a freedom to trespass, the Court's primary concern has been to determine the extent of the right and the surrounding safeguards necessary to give it "breathing space." *NAACP v. Button*, 371 U.S. 415, 433. That concern has perhaps omitted from searching consideration the "real problem" of defining or delimiting the right itself. See Freund, Mr. Justice Black and the Judicial Function, 14 U. C. L. A. L. Rev. 467, 471.

It is significant that the guarantee of freedom of speech and press falls between the religious guarantees and the guarantee of the right to petition for redress of grievances in the text of the First Amendment, the principles of which are carried to the States by the Fourteenth Amendment. It partakes of the nature of both, for it is as much a guarantee to individuals of their personal right to make their thoughts public and put them before the community, see Holt, Of the Liberty of the Press, in Nelson, Freedom of the Press from Hamilton to the Warren Court 18-19, as it is a social necessity required for the "maintenance of our political system and an open society." *Time, Inc. v. Hill, supra*, at 389. It is because of the personal nature of this right that we have rejected all manner of prior restraint on publication, *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, despite strong arguments that if the material was unprotected the time of suppression was immaterial. Pound, Equitable Relief Again Defamation and Injuries to Personality, 29 Harv. L. Rev. 640. The dissemination of the individual's opinions on matters of public interest is for us, in the historic words of the Declaration of Independence, an "inalienable right" that "governments are instituted among men to secure." History shows us that the Founders were not always convinced that unlimited discussion of public issues would be "for the benefit of all of us"[13] but that

[13] See Levy, Legacy of Suppression. The phrase is from the Court's opinion in *Time, Inc. v. Hill, supra*, at 389.

they firmly adhered to the proposition that the "true liberty of the press" permitted "every man to publish his opinions." *Respublica v. Oswald*, 1 Dall. 319 (Pa.).

The fact that dissemination of information and opinion on questions of public concern is ordinarily a legitimate, protected and indeed cherished activity does not mean, however, that one may in all respects carry on that activity exempt from sanctions designed to safeguard the legitimate interests of others. A business "is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others." *Associated Press v. N.L.R.B.*, 301 U.S. 103, 132-133. Federal Securities regulation,[14] mail fraud statutes,[15] and common-law actions for deceit and misrepresentation[16] are only some examples of our understanding that the right to communicate information of public interest is not "unconditional." See Note, Freedom of expression in a Commercial Context, 78 Harv. L. Rev. 1191. However, as our decision in *New York Times* makes explicit, while protected activity may in some respects be subjected to sanctions, it is not open to all forms of regulation. The guarantees of freedom of speech and press were not designed to prevent "the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential . . . ." 2 Cooley, Constitutional Limitations (8th ed.) 886. Our touchstones are that acceptable limitations must not affect "the impartial distribution of news" and ideas, *Associated Press v. N.L.R.B.*, *supra*, at 133, nor because of their history or impact constitute a special burden on the press, *Gros-*

[14] *E.g.*, 15 U.S.C. § 77k (penalizing negligent misstatement).
[15] 18 U.S.C. § 1341.
[16] See *Traylor Engineering & Mfg. Co. v. National Container Corp.*, 6 Del. 143, 70 A.2d 9; Restatement, Torts § 525 (deceit); *Nash v. Minnesota Title Ins. & Trust Co.*, 163 Mass. 574, 40 N.E. 1039 (negligent misrepresentation).

jean v. American Press Co., Inc., 297 U.S. 233, nor deprive our free society of the stimulating benefit of varied ideas because their purveyors fear physical or economic retribution solely because of what they choose to think and publish.

The history of libel law leaves little doubt that it originated in soil entirely different from that which nurtured these constitutional values. Early libel was primarily a criminal remedy, the function of which was to make punishable any writing which tended to bring into disrepute the state, established religion, or any individual likely to be provoked to a breach of the peace because of the words. Truth was no defense in such actions and while a proof of truth might prevent recovery in a civil action, this limitation is more readily explained as a manifestation of judicial reluctance to enrich an undeserving plaintiff than by the supposition that the defendant was protected by the truth of the publication. The same truthful statement might be the basis of a criminal libel action. See *Commonwealth v. Clap*, 4 Tyng 163 (Mass.); see generally Veeder, The History and Theory of the Law of Defamation, 3 Col. L. Rev. 546.

The law of libel has, of course, changed substantially since the early days of the Republic, and this change is "the direct consequence of the friction between it . . . and the highly cherished right of free speech." *State v. Browne*, 86 N.J. Super 217, 228, 206 A.2d 591, 597. The emphasis has shifted from criminal to civil remedies, from the protection of absolute social values to the safeguarding of valid personal interests. Truth has become an absolute defense in almost all cases,[17] and privileges designed to foster free communication are almost universally recognized.[18] But the

[17] See 1 Harper & James, The Law of Torts § 5.20.

[18] Some privileges such as the one pertaining to reports of judicial proceedings are recognized as absolute. Others, such as the fair-comment privilege are recognized only as conditional privileges and may be vitiated by proof of actual malice. See generally, Prosser, The Law of Torts §§ 109, 110.

basic theory of libel has not changed, and words defamatory of another, are still placed "in the same class with the use of explosives or the keeping of dangerous animals." Prosser Torts § 108, at 792. Thus some antithesis between freedom of speech and press and libel actions persists, for libel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments, at least without guaranteeing legal proof of their substantial accuracy.

While the truth of the underlying facts might be said to mark the line between publications which are of significant social value and those which might be suppressed without serious social harm and thus resolve the antithesis on a neutral ground, we have rejected, in prior cases involving materials and persons commanding justified and important public interest, the argument that a finding of falsity alone should strip protections from the publisher. *New York Times Co. v. Sullivan, supra,* at 272. We have recognized that "putting to the pre-existing prejudices of a jury the determination of what is 'true' may effectively institute a system of censorship," and "the inevitability of some error in the situation presented in free debate," *Time, Inc. v. Hill, supra,* at 406. (Opinion of this writer.)

Our resolution of *New York Times Co. v. Sullivan,* in the context of the numerous statutes and cases which allow ideologically neutral, and generally applicable regulatory measures to be applied to publication, makes clear, however, that neither the interests of the publisher nor those of society necessarily preclude a damage award based on improper conduct which creates a false publication. It is the conduct element, therefore, on which we must principally focus if we are successfully to resolve the antithesis between civil libel actions and the freedom of speech and press. Impositions based on misconduct can be neutral with respect to content of the speech involved, free of historical taint, and adjusted to strike a fair balance between the interests of the community in free circulation of information and

those of individuals in seeking recompense for harm done by the circulation of defamatory falsehood.

In *New York Times* we were adjudicating in an area which lay close to seditious libel, and history dictated extreme caution in imposing liability. The plaintiff in that case was an official whose position in government was such "that the public [had] an independent interest in the qualifications and performance of the person who [held] it." *Rosenblatt v. Baer*, *supra*, at 86. Such officials usually enjoy a privilege against libel actions for their utterances, see, *e. g.*, *Barr v. Matteo*, 360 U.S. 564, and there were analogous considerations involved in *New York Times*, *supra*, at 282. Thus we invoked "the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies," *Dennis v. United States*, 341 U.S. 494, 503, and limited recovery to those cases where "calculated falsehood" placed the publisher "at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected." *Garrison v. Louisiana*, 379 U.S. 64, 75. That is to say, such officials were permitted to recover in libel only when they could prove that the publication involved was deliberately falsified, or published recklessly despite the publisher's awareness of probable falsity. Investigatory failures alone were held insufficient to satisfy this standard. See *New York Times*, at 268-288, 292; *Garrison v. Louisiana*, *supra*, at 73-75, 79.

In the cases we decide today none of the particular considerations involved in *New York Times* is present. These actions cannot be analogized to prosecutions for seditious libel. Neither plaintiff has any position in government which would permit a recovery by him to be viewed as a vindication of governmental policy. Neither was entitled to a special privilege protecting his utterances against accountability in libel. We are prompted, therefore, to seek guidance from the rules of

liability which prevail in our society with respect to compensation of persons injured by the improper performance of a legitimate activity by another. Under these rules, a departure from the kind of care society may expect from a reasonable man performing such activity leaves the actor open to a judicial shifting of loss. In defining these rules, and especially in formulating the standards for determining the degree of care to be expected in the circumstances, courts have consistently given much attention to the importance of defendants' activities. Prosser, The Law of Torts § 31, at 151. The courts have also, especially in libel cases, investigated the plaintiff's position to determine whether he has a legitimate call upon the court for protection in light of his prior activities and means of self-defense. See *Brewer v. Hearst Publishing Co.*, 185 F.2d 846; *Flanagan v. Nicholson Publishing Co.*, 137 La. 587, 68 So. 964. We note that the public interest in the circulation of the materials here involved, and the publisher's interest in circulating them, is not less than that involved in *New York Times*. And both Butts and Walker commanded a substantial amount of independent public interest at the time of the publications; both, in our opinion, would have been labeled "public figures" under ordinary tort rules. See *Spahn v. Julian Messner, Inc.*, 18 N.Y.2d 324, 221 N.E.2d 543, remanded on other grounds, — U.S. —. Butts hay have attained that status by position alone and Walker by his purposeful activity amounting to a thrusting of his personality into the "vortex" of an important public controversy, but both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able "to expose through discussion the falsehood and fallacies" of the defamatory statements. *Whitney v. California*, 274 U.S. 357, 377 (Brandeis, J., dissenting).

These similarities and differences between libel actions involving persons who are public officials and libel actions involving those circumstanced as were

Butts and Walker, viewed in light of the principles of liability which are of general applicability in our society, lead us to the conclusion that libel actions of the present kind cannot be left entirely to state libel laws, unlimited by any overriding constitutional safeguard, but that the rigorous federal requirements of *New York Times* are not the only appropriate accommodation of the conflicting interests at stake. We consider and would hold that a "public figure" who is not a public official may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers. Cf. Sulzberger, Responsibility and Freedom in Nelson, Freedom of the Press from Hamilton to the Warren Court, 409, 412.

Nothing in this opinion is meant to affect the holdings in *New York Times* and its progeny, including our recent decision in *Time, Inc. v. Hill.*[19]

V.

Having set forth the standard by which we believe the constitutionality of the damage awards in these cases must be judged, we turn now, as the Court did in *New York Times*, to the question whether the evidence and findings below meet that standard. We find the standard satisfied in No. 37, *Butts*, and not satisfied by either the evidence or the findings in No. 150, *Walker*.

The *Butts* jury was instructed, in considering punitive damages, to assess "the reliability, the nature of the sources of the defendant's information, its acceptance or rejection of the sources, and its care in checking upon assertions." These considerations were said to be relevant to a determination whether defend-

[19] Nor does anything we have said touch, in any way, libel or other tort actions not involving public figures or matters of public interest.

ant had proceeded with "wanton and reckless indifference." In this light we consider that the jury must have decided that the investigation undertaken by the Saturday Evening Post, upon which much evidence and argument was centered,[20] was grossly inadequate in the circumstances. The impact of a jury instruction "is not to be ascertained by merely considering isolated statements but by taking into view all the instructions given and the tendencies of proof in the case to which they could possibly be applied." *Seaboard Air Line Ry. v. Padgett*, 236 U.S. 668, 672.

This jury finding was found to be supported by the evidence by the trial judge and the majority in the Fifth Circuit. Given the extended history of the case, the amount of the evidence pointing to serious deficiencies in investigatory procedure, and the severe harm inflicted on Butts, we would not feel justified in ordering a retrial of the compensatory damage issue, either on the theory that this aspect of the case was submitted to the jury only under the issue of "truth,"[21] or on the

[20] Counsel for Butts continually pressed upon the jury in argument that the defendant had failed to exercise a minimum of care. He did not seriously contend that the Saturday Evening Post was actuated by pre-existing animosity toward Butts. Arguing that the misquotations which were shown to be present were proof of malice he stated: "I say that is not fair journalism; I say that is not true, careful reporting." After reviewing the failure of Curtis to interview Carmichael (see p. 25, *infra*) or to check the game films, he asked the jury: "Again, is that good reporting? Is that what the field or the profession of journalism owes you and owes me . . . when it is getting ready to write an article which it knows and which it states therein that it is going to ruin us. . . ." The gist of Butts' contention on "actual malice" was that Curtis had been anxious to publish an expose and had thus wantonly and recklessly seized on a questionable affidavit from Burnett. It is this theory which we feel that the jury must have accepted in awarding punitive damages.

[21] It is inconceivable that the jury might have treated the "investigatory" evidence differently if it had been presented with respect to compensatory damages rather than with regard to punitive damages.

very slim possibility that the jury finding regarding punitive damages might have been based on Curtis' attitude toward Butts rather than on Curtis' conduct.

The evidence showed that the Butts story was in no sense "hot news" and the editors of the magazine recognized the need for a thorough investigation of the serious charges. Elementary precautions were, nevertheless, ignored. The Saturday Evening Post knew that Burnett had been placed on probation in connection with bad check charges, but proceeded to publish the story on the basis of his affidavit without substantial independent support. Burnett's notes were not even viewed by any of the magazine's personnel prior to publication. John Carmichael who was supposed to have been with Burnett when the phone call was overheard was not interviewed. No attempt was made to screen the films of the game to see if Burnett's information was accurate, and no attempt was made to find out whether Alabama had adjusted its plans after the alleged divulgence of information.

The Post writer assigned to the story was not a football expert and no attempt was made to check the story with someone knowledgeable in the sport. At trial such experts indicated that the information in the Burnett notes was either such that it would be evident to any opposing coach from game films regularly exchanged or valueless. Those assisting the Post writer in his investigation were already deeply involved in another libel action, based on a different article, brought against Curtis Publishing Co. by the Alabama coach and unlikely to be the source of a complete and objective investigation. The Saturday Evening Post was anxious to change its image by instituting a policy of "sophisticated muckraking," and the pressure to produce a successful expose might have induced a stretching of standards. In short, the evidence is ample to support a finding of highly unreasonable conduct constituting an extreme departure from the standards of

investigation and reporting ordinarily adhered to by responsible publishers.

The situation in *Walker* is considerably different. There the trial court found the evidence insufficient to support more than a finding of even ordinary negligence and the Court of Civil Appeals supported the trial court's view of the evidence. Ordinarily we would, under the governing constitutional standard, reverse the decision below on the concurrent findings rule. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275. But, as in *New York Times*, we think it better to face for ourselves the question whether there is sufficient evidence to suport the finding we would require.

In contrast to the *Butts* article, the dispatch which concerns us in *Walker* was news which required immediate dissemination. The Associated Press received the information from a correspondent who was present at the scene of the events and gave every indication of being trustworthy and competent. His dispatches in this instance, with one minor exception, were internally consistent and would not have seemed unreasonable to one familiar with General Walker's prior publicized statements on the underlying controversy.[22] Considering the necessity for rapid dissemination, nothing in this series of events gives the slightest hint of a severe

[22] On September 26, 1962, Walker had made a statement on radio station KWKH at Shreveport, Louisiana, urging people to "[r]ise to a stand beside Governor Ross Barnett at Jackson, Mississippi." He contended that the people had "talked, listened and been pushed around far too much . . ." He promised that he would "be there," on "the right side." The next morning in a television appearance in Dallas he repeated the same sentiments, and he set out his views once again from New Orleans on the evening of September 28, 1962. On September 29, 1962, Walker arrived in Jackson, Mississippi, and held another press and television conference in which he called for "violent vocal protest." On the afternoon of September 30, 1962, Walker held a final press conference at which he again urged defiance of court orders and federal power.

departure from accepted publishing standards. We therefore conclude that General Walker should not be entitled to damages from the Associated Press.

VI.

We come finally to Curtis' contention that whether or not it can be required to compensate Butts for any injury it may have caused him, it cannot be subjected to an assessment for punitive damages limited only by the "enlightened conscience" of the community. Curtis recognizes that the Constitution presents no general bar to the assessment of punitive damages in a civil case, *Day v. Woodworth*, 13 How. 363, 370-371, but contends that an unlimited punitive award against a magazine publisher constitutes an effective prior restraint by giving the jury the power to destroy the publisher's business. We cannot accept this reasoning. Publishers like Curtis engage in a wide variety of activities which may lead to tort suits where punitive damages are a possibility. To exempt a publisher, because of the nature of his calling, from an imposition generally exacted from other members of the community, would be to extend a protection not required by the constitutional guarantee. *Associated Press v. N. L. R. B., supra.* We think the constitutional guarantee of freedom of speech and press is adequately served by judicial control over excessive jury verdicts, manifested in this instance by the trial court's remittitur, and by the general rule that a verdict based on jury prejudice cannot be sustained even when punitive damages are warranted. See, *e.g., Minneapolis, St. P.&S.S.M. Ry. v. Moquin*, 283 U.S. 520, 521.

Despite this conclusion, it might be argued that an award of punitive damages cannot be justified constitutionally by the same degree of misconduct required to support a compensatory award. The usual rule in libel actions, and other state-created tort actions, is

that a higher degree of fault is necessary to sustain a punitive imposition than a compensatory award. And it might be asserted that the need to compensate the injured plaintiff is not relevant to the issue of punitive damages in libel since an award of general damages compensates for any possible pecuniary and intangible harm. Thus the argument would be that the strong speech and press interest in publishing material on public issues, which we have recognized as parallel to the interest in publishing political criticism present in *New York Times*, must be served by a limitation on punitive damages restricting them to cases of "actual malice" as defined in *New York Times* and *Garrison v. Louisiana, supra.* We find the force of any such argument quite insufficient to overcome the compelling contrary considerations, and there is, moreover, nothing in any of our past cases which suggests that compensatory and punitive damages are subject to different constitutional standards of misconduct.

Where a publisher's departure from standards of press responsibility is severe enough to strip from him the constitutional protection our decision acknowledges, we think it entirely proper for the State to act not only for the protection of the individual injured but to safeguard all those similarly situated against like abuse. Moreover, punitive damages require a finding of "ill will" under general libel law and it is not unjust that a publisher be forced to pay for the "venting of his spleen" in a manner which does not meet even the minimum standards required for constitutional protection. Especially in those cases where circumstances outside the publication itself reduce its impact sufficiently to make a compensatory imposition an inordinately light burden, punitive damages serve a wholly legitimate purpose in the protection of individual reputation. We would hold, therefore, that misconduct sufficient to justify the award of compensatory damages also justifies the imposition of a punitive award, subject of course to the limitation that such

award is not demonstrated to be founded on the mere prejudice of the jury. As we have already noted (*supra*, pp. 23-25) the case on punitive damages was put to the jury under instructions which satisfied the constitutional test we would apply in cases of this kind, and the evidence amply supported the jury's findings.[23]

The judgment of the Court of Appeals for the Fifth Circuit in No. 37 is affirmed. The judgment of the Texas Court of Civil Appeals in No. 150 is reversed and the case is remanded to that court for further proceedings not inconsistent with the opinions that have been filed herein by THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE BRENNAN.

It is so ordered.

[23] It should also be noted that prior to publication the Saturday Evening Post had been notified both by Butts and his daughter that the material about to be printed was false. Despite these warnings, and the fact that no member of the staff had ever even seen Burnett's crucial notes, no further efforts at investigation were undertaken prior to publication. It might indeed be argued that this conduct would have sufficed, under proper instructions, to satisfy even the "actual malice" standard of *New York Times*, the notice to the Saturday Evening Post being considered as furnishing the necessary "mental element." *New York Times*, *supra*, at 287.

Supreme Court of the United States

Nos. 37 and 150. — OCTOBER TERM, 1966

	Curtis Publishing Co., *Petitioner*,	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
37	*v.*	
	Wallace Butts.	
	Petitioner,	On Writ of Certiorari to the Court of Civil Appeals of Texas.
150	*v.*	
	Edwin A. Walker.	

[June 12, 1967.]

MR. CHIEF JUSTICE WARREN, concurring in the result.

While I agree with the results announced by MR. JUSTICE HARLAN in both of these cases, I find myself in disagreement with his stated reasons for reaching those results. Our difference stems from his departure from the teaching of *New York Times v. Sullivan*, 376 U.S. 254 (1964), to which we both subscribed only three years ago.

I.

In the *New York Times* case, we held that a State cannot, consistently with the First and Fourteenth Amendments, award damages to a "public official" for a defamatory falsehood relating to his official conduct unless the verdict is based on proof of "actual malice" — that is, proof that the defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S., at 280. The present cases involve not "public officials," but "public figures" whose views and actions with re-

spect to public issues and events are often of as much concern to the citizen as the attitudes and behavior of "public officials" with respect to the same issues and events.

All of us agree that the basic considerations underlying the First Amendment require that some limitations be placed on the application of state libel laws to "public figures" as well as "public officials." Similarly, the seven members of the Court who deem it necessary to pass upon the question agree that the respondents in these cases are "public figures" for First Amendment purposes. Having reached this point, however, MR. JUSTICE HARLAN'S opinion departs from the standard of *New York Times* and substitutes in cases involving "public figures" a standard that is based on "highly unreasonable conduct" and is phrased in terms of "extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers" (*ante*, p. —). I cannot believe that a standard which is based on such an unusual and uncertain formulation could either guide a jury of layment or afford the protection for speech and debate that is fundamental to our society and guaranteed by the First Amendment.

To me, differentiation between "public figures" and "public officials" and adoption of separate standards of proof for each has no basis in law, logic, or First Amendment policy. Increasingly in this country, the distinctions between governmental and private sectors are blurred. Since the depression of the 1930's and World War II there has been a rapid fusion of economic and political power, a merging of science, industry, and government, and a high degree of interaction between the intellectual, governmental, and business worlds. Depression, war, international tensions, national and international markets, and the surging growth of science and technology have precipitated national and international problems that demand national and international solutions. While these trends

and events have occasioned a consolidation of governmental power, power has also become much more organized in what we have commonly considered to be the private sector. In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.

Viewed in this context then, it is plain that although they are not subject to the restraints of the political process, "public figures," like "public officials," often play an influential role in ordering society. And surely as a class these "public figures" have as ready access as "public officials" to mass media of communication, both to influence policy and to counter criticism of their views and activities. Our citizenry has a legitimate and substantial interest in the conduct of such persons, and freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of "public officials." The fact that they are not amenable to the restraints of the political process only underscores the legitimate and substantial nature of the interest, since it means that public opinion may be the only instrument by which society can attempt to influence their conduct.

I therefore adhere to the *New York Times* standard in the case of "public figures" as well as "public officials." It is a manageable standard, readily stated and understood, which also balances to a proper degree the legitimate interests traditionally protected by the

law of defamation. Its definition of "actual malice" is not so restrictive that recovery is limited to situations where there is "knowing falsehood" on the part of the publisher of false and defamatory matter. "Reckless disregard" for the truth or falsity, measured by the conduct of the publisher, will also expose him to liability for publishing false material which is injurious to reputation. More significantly, however, the *New York Times* standard is an important safeguard for the rights of the press and public to inform and be informed on matters of legitimate interest. Evenly applied to cases involving "public men"—whether they be "public officials" or "public figures" — it will afford the necessary insulation for the fundamental interests which the First Amendment was designed to protect.

II.

I have no difficulty in concluding that No. 150, *The Associated Press v. Walker*, must be reversed since it is in clear conflict with *New York Times*. The constitutional defenses were properly raised and preserved by the petitioner. The trial judge expressly ruled that no showing of malice in any sense had been made, and he reversed an award of punitive damages for that reason. The seven members of this Court who reach the question agree with that conclusion, and all agree that the courts below erred in holding the First Amendment inapplicable. Under any reasoning, General Walker was a public man in whose public conduct society and the press had a legitimate and substantial interest.

III.

But No. 37, *Curtis Publishing Co. v. Butts*, presents an entirely different situation. There, no First Amendment defenses were raised by the petitioner until after the trial. Because of this failure and because

the case was tried before our decision in *New York Times*, the trial judge did not instruct the jury in terms of the precise formulation we adopted. In connection with the issue of punitive damages, however, the trial judge did give an "actual malice" instruction which invoked the elements we later held necessary in *New York Times*. He instructed the jury that it would have to find "actual malice" before awarding punitive damages, and he continued by defining "actual malice" as denoting "wanton or reckless indifference or culpable negligence with regard to the rights of others" and as including notions of "ill will, spite, hatred and an intent to injure one." Under the Georgia law of defamation which governed the case, the jury was also specifically required to find that the defamatory statements were false before it could award any damages, and it was so instructed. With the jury's attention thus focussed on this threshold requirement of falsity, the references in the instructions to wanton or reckless indifference and *culpable* negligence most probably resulted in a verdict based on the requirement of reckless disregard for the truth of which we spoke in *New York Times*.[1] Although the "actual malice" instructions were not also given in connection with the compensatory damage issue, it is difficult to conceive of how petitioner could have been prejudiced by that failure in view of the fact that the jury, guided by "actual malice" instructions, awarded $3,000,000 in punitive damages.[2]

[1] We held unconstitutional in *Garrison v. Louisiana*, 379 U.S. 64 (1964), a criminal defamation statute which authorized conviction on proof that a defamatory statement had been motivated by ill will. The statute did not require that the defamatory statement be false to sustain such a conviction.

[2] In the *New York Times* case, "actual malice" instructions were given in connection with punitive damages. However, we noted: "While Alabama law apparently requires proof of actual malice for an award of punitive damages, where general damages are concerned malice is presumed. Such a presumption is inconsistent with the federal rule... Since the trial

Unquestionably, in cases tried after our decision in *New York Times* we should require strict compliance with the standard we established. We should not, however, be so inflexible in judging cases tried prior thereto, especially when as here the trial judge — unaided by advice or objections from counsel — recognized the essential principle and conformed with it to a substantial degree. Moreover, after the *New York Times* rule was brought to the trial judge's attention in a post-trial motion, he reviewed the record in light of that precise standard and held that the jury verdict should not be disturbed since "there was ample evidence from which a jury could have concluded that there was reckless disregard by the [petitioner] of whether the article was false or not."

An additional factor leads me to the conclusion that we should not insist on the financial and emotional expenses of a retrial here merely because the trial judge's instructions were not given in the precise terms of the present constitutional standard.[3] That factor, to which I briefly adverted above, was the choice of the petitioner in this case to raise only truth as a defense and to omit in its pleadings and at the trial any reference to possible First Amendment defenses or even to the conditional privilege provided by Georgia law for "comments upon the acts of public men in their public capacity and with reference thereto."[4]

judge did not instruct the jury to differentiate between general and punitive damages, it may be that the verdict was wholly an award of one or the other. But it is impossible to know, in view of the general verdict returned. *Because of this uncertainty*, the judgment must be reversed and the case remanded." 376 U.S., at 283-284. (Emphasis added.)

The jury in the present case was required to separate compensatory and punitive damages.

[3] Cf. *Time, Inc. v. Hill*, 385 U.S. 374, 411 (1967) (concurring opinion of MR. JUSTICE FORTAS).

[4] Ga. Code Ann. § 105-709 (6) provides:

"Privileged communications. — The following are deemed privileged communications:

I use the word "choice" in this connection, because the facts lead me, as they did the Court of Appeals, to the firm conclusion that the omissions were deliberate. Although this trial occurred before our decision in *New York Times*, we had granted certiorari to review that case even before the complaint here was filed.[5] The Alabama law firm which had represented the New York Times in the state courts was involved in the trial of this case. Lead counsel in the cases conferred periodically, and one of the members of the Alabama law firm referred to above sat at the counsel table throughout this trial. The same Alabama law firm was retained to represent petitioner in a lawsuit filed by Coach Paul Bryant, who was also libeled by the magazine article here in question. First Amendment defenses were raised both at the trial of the *New York Times* case and by the pleadings in the Bryant lawsuit which was settled for a substantial sum of money. But counsel did not raise such defenses here. Given the importance of this case to petitioner and the interplay between overlapping counsel aligned on the same sides of related lawsuits, I can only conclude that tactical or public relations considerations explain the failure here to defend on First Amendment grounds.

"6. Comments upon the acts of public men in their public capacity and with reference thereto."
This privilege is qualified by Ga. Code Ann. § 105-710, which provides.

"Malicious use of privilege.—In every case of privileged communications, if the privilege is used merely as a cloak for venting private malice, and not bona fide in promotion of the object for which the privilege is granted, the party defamed shall have a right of action."

[5] Certiorari was granted in *New York Times v. Sullivan* on January 7, 1963. 371 U.S. 946. The complaint in this case was filed approximately 2½ months later, on March 25, 1963. Counsel here could not have anticipated the precise standard we announced in *New York Times*. In the Bryant lawsuit and, of course, in the *New York Times* case itself counsel did, however, raise general First Amendment defenses. No reference whatever to the First Amendment was made by defense counsel in the trial of this case.

IV.

Satisfied, as I am, that under the circumstances of the *Butts* case no retrial should be ordered merely because of the instructions, I turn now to the final duty which this Court has when violations of fundamental constitutional principles are alleged. We must review the evidence to ascertain whether the judgment can stand consistently with those principles. *New York Times v. Sullivan*, 376 U.S. 254, 285 (1964); *Speiser v. Randall*, 357 U.S. 513, 525 (1958).

The petitioner in this case is a major factor in the publishing business. Among its publications is the Saturday Evening Post which published the defamatory falsehoods here in question. Apparently because of declining advertising revenues, an editorial decision was made to "change the image" of the Saturday Evening Post with the hope that circulation and advertising revenues would thereby be increased. The starting point for this change of image was an announcement that the magazine would embark upon a program of "sophisticated muckraking," [6] designed to "provoke people, make them mad."

Shortly thereafter, and as an apparent implementation of the new policy, the Saturday Evening Post purchased the rights to the article which formed the subject matter of this case. The slipshod and sketchy investigatory techniques employed to check the veracity of the source and the inferences to be drawn from the few facts believed to be true are detailed at length in

[6] Webster's New International Dictionary (2d ed., unabr.), p. 1606, reports the source of the term "muckrake" as follows: "On April 14, 1906, President Roosevelt delivered a speech in which he used the term *muckrake* in attacking the practice of making sweeping and unjust charges of corruption against public men and corporations . . ."
Roget's International Thesaurus § 934 (3) lists the following as synonyms: muckrake; throw mud at; throw or fling dirt at; drag through the mud; bespatter.

the opinion of MR. JUSTICE HARLAN. Suffice it to say that little investigative effort was expended initially, and no additional inquiries were made even after the editors were notified by respondent and his daughter that the account to be published was absolutely untrue. Instead, the Saturday Evening Post proceeded on its reckless course with full knowledge of the harm that would likely result from publication of the article, This knowledge was signaled by the statements at the conclusion of the article that "Wally Butts will never help any football team again" and "careers will be ruined, that is sure."

I am satisfied that the evidence here discloses that degree of reckless disregard for the truth of which we spoke in *New York Times* and *Garrison.* Freedom of the press under the First Amendment does not include absolute license to destroy lives or careers.

Supreme Court of the United States

Nos. 37 and 150. — OCTOBER TERM, 1966.

37	Curtis Publishing Co., *Petitioner*, v. Wallace Butts.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
150	The Associated Press, *Petitioner*, v. Edwin A. Walker.	On Writ of Certiorari to the Court of Civil Appeals of Texas.

[June 12, 1967.]

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring in No. 150, and dissenting in No. 37.

I concur in reversal of the judgment in No. 150, *The Associated Press v. Walker*, based on the grounds and reasons stated in Parts I and II of THE CHIEF JUSTICE's opinion. I do this, however, as in *Time, Inc. v. Hill*, 385 U.S. 374, 398, "in order for the Court to be able at this time to agree on an opinion in this important case based on the prevailing constitutional doctrine expressed in *New York Times v. Sullivan*, 376 U.S. 254. [THE CHIEF JUSTICE's] . . . opinion decides the case in accordance with this doctrine, to which the majority adhere. In agreeing to . . . [that] opinion, I do not recede from any of the views I have previously expressed about the much wider press and speech freedoms I think the First and Fourteenth Amendments were designed to grant to the people of the Nation. See, *e.g.*, *New York Times v. Sullivan*, 376 U.S., at 293 (concurring opinion); *Rosenblatt v. Baer*, 383 U.S. 75, 94 (concurring and dissenting opinion)."

I would reverse the judgment in No. 37 for the reasons given in my concurring opinion in *New York Times v. Sullivan*, 376 U.S. 254, 293, and my concurring and dissenting opinion in *Rosenblatt v. Baer*, 383 U.S. 75, 94, but wish to add a few words.

These cases illustrate, I think, the accuracy of my prior predictions that the *New York Times* constitutional rule concerning libel is wholly inadequate to save the press from being destroyed by libel judgments. Here the Court reverses the case of *Associated Press v. Walker*, but affirms the judgment of *Curtis Publishing Co. v. Butts*. The main reason for this quite contradictory action, so far as I can determine, is that the Court looks at the facts in both cases as though it were a jury and reaches the conclusion that the Saturday Evening Post, in writing about Butts, was so abusive that its article is more of a libel at the constitutional level than is the one by the Associated Press. That seems a strange way to erect a constitutional standard for libel cases. If this precedent is followed, it means that we must in all libel cases hereafter weigh the facts and hold that all papers and magazines guilty of gross writing or reporting are constitutionally liable, while they are not if the quality of the reporting is approved by a majority of us. In the final analysis, what we do in these circumstances is to review the factual questions in cases decided by juries — a review which is a flat violation of the Seventh Amendment.

It strikes me that the Court is getting itself in the same quagmire in the field of libel in which it is now helplessly struggling in the field of obscenity. No one, including this Court, can know what is and what is not constitutionally obscene or libelous under this Court's rulings. Today the Court will not give the First Amendment its natural and obvious meaning by holding that a law which seriously menaces the very life of press freedom violates the First Amendment. In fact, the Court is suggesting various experimental

expedients in libel cases, all of which boil down to a determination of how offensive to this Court a particular libel judgment may be, either because of its immense size or because the Court does not like the way an alleged libelee was treated. Again I suggest (see *Time, Inc. v. Hill*, 385 U.S. 374, 399) that we are rapidly but surely getting ourselves in the dilemma we found ourselves in when we were compelled to overrule the ill-starred case of *Betts v. Brady*, 316 U.S. 455,* in order that the state courts of the country might be able to determine with some degree of certainty when an indigent person was entitled to the benefit of a lawyer and avoid the spawning of hundreds of habeas corpus cases that finally raised questions that a lawyer could and would have raised at the trial.

I think it is time for this Court to abandon *New York Times v. Sullivan* and adopt the rule to the effect that the First Amendment was intended to leave the press free from the harassment of libel judgments.

**Gideon v. Wainwright*, 372 U.S. 335.

Supreme Court of the United States

Nos. 37 and 150. — OCTOBER TERM, 1966.

37	Curtis Publishing Co., *Petitioner*, v. Wallace Butts.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
150	The Associated Press, *Petitioner*, v. Edwin A. Walker.	On Writ of Certiorari to the Court of Civil Appeals of Texas.

[June 12, 1967.]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE joins, concurring in No. 150, and dissenting in No. 37.

I join Parts I and II of the opinion of THE CHIEF JUSTICE and the disposition in No. 150, *Associated Press v. Walker*.

In No. 37, *Curtis Publishing Co. v. Butts*, insofar as THE CHIEF JUSTICE's opinion demonstrates that the evidence unmistakably would support a judgment for Butts under the *New York Times* standard, I agree. I would, however, remand for a new trial since the charge to the jury did not comport with that standard.[1] The charge on compensatory damages directed that the jury find liability on a finding of mere falsehood. And the trial court stated that punitive damages might be awarded on a finding of "actual

[1] For the reasons expressed in the opinion of MR. JUSTICE HARLAN I agree that petitioner did not waive his contentions under *New York Times*.

malice" which it defined to encompass "the notion of ill will, spite, hatred and an intent to injure one," and also to denote "a wanton or reckless indifference or culpable negligence with regard to the rights of others." The court detailed some factors the jury could consider in applying this standard. It said, for example, that "a publication may be so extravagant in its denunciation and so vituperative in its character as to justify an inference of malice," and that "proof that the plaintiff did demand a retraction but that the defendant failed to retract the article may be considered by you on the question of punitive damages." But "[d]ebate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth." *Garrison v. Louisiana*, 379 U.S. 64, 73. The "good motives" of the publisher can be no more relevant in the context of "public men" than in the context of criticism of "public officials." See *Garrison*, *supra*. The court added that the Post could show *in mitigation* of punitive damages that "it in good faith relied upon matters which had come to its attention." This makes crystal clear that the standard announced authorized the jury to award punitive damages even though it found that the Post had in good faith relied on matters which had come to its attention. The charge undoubtedly fails to comport with *New York Times*.[2]

That the evidence might support a verdict under *New York Times* cannot justify our taking from the jury the function of determining, under proper instruc-

[2] The statement by the trial court that "malice also denotes a wanton or reckless indifference or culpable negligence with regard to the rights of others" could reasonably have been regarded by the jury to relate not to the truth or falsity of the matter, but to the Post's attitude toward Butt's reputation, akin to the spite and ill will in which terms the court had just defined "malice." See *Time, Inc. v. Hill*, 385 U.S. 374, 396, n. 12.

tions, whether the *New York Times* standard has been met. The extent of this Court's role in reviewing the facts, in a case such as this, is to ascertain whether there is evidence by which a jury could reasonably find liability under the constitutionally required instructions. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-292; *Time, Inc. v. Hill*, 385 U.S. 374, 391-394. When, as in this case, such evidence appears, the proper disposition in this federal case is to reverse and remand with direction of a new trial. See *Time, Inc. v. Hill*, *supra*.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition and Appendix has been furnished by mail this 13th day of May 1968 to the following: Paul A. Louis and Bertha Claire Lee, 1601 Alfred I. duPont Building, Miami, Florida; Sams, Anderson, Alper & Spencer, 150 S.E. Third Avenue, Miami, Florida; Peter Tonkoff, 616 Miller Building, Yakima, Washington; and Melvin M. Belli, 722 Montgomery Street, San Francisco, California.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 96

ORLANDO DAILY NEWSPAPERS, INC., et al.,
Petitioners,

vs.

MELVIN M. BELLI,
Respondent.

Response to Petition for Writ of Certiorari

PAUL A. LOUIS and
BERTHA CLAIRE LEE
1600 Alfred I. duPont Building
Miami, Florida 33131
Counsel for Respondent

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. _____

ORLANDO DAILY NEWSPAPERS, INC., et al.,
Petitioners,

vs.

MELVIN M. BELLI,
Respondent.

Response to Petition for Writ of Certiorari

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, MELVIN M. BELLI, plaintiff below, files this his Response to the Petition for Writ of Certiorari filed by the ORLANDO DAILY NEWSPAPERS, INC., MARTIN ANDERSEN, JEAN YOTHERS, and LEON HANDLEY (hereinafter Petitioners).

PREFACE

The following symbols will be used:

PW — Petition for Writ of Certiorari
PA — Petitioners' Appendix
R — Record

All emphasis will be ours unless otherwise indicated.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals sought to be reviewed by petitioners is presently reported at 389 F. 2d 579 (5th Circuit, 1968).

STATEMENT OF THE CASE

Respondent accepts petitioners' Statement of the Case except for certain significant additions. Paragraph 2 at page 4 of the Petition should contain this finding by the trial court (PA 18; R 64):

> This Court holds that the complaint does not allege libel per se of the plaintiff in either his personal or professional capacity. The article, as alleged in Count I of the complaint, did not, by the application of the "common mind test", subject the plaintiff to "hatred, distrust, ridicule, comtempt or disgrace . . ." *Adams v. News-Journal Corp.*, supra, at 551.

Paragraph 3 at page 4 of the Petition omitted these specific rulings by the Fifth Circuit Court of Appeals:

1. The statement specifying the error of the trial court (PA 23; 389 F. 2d. at 581):

> The Court relied on the erroneous assumption that the determination whether a statement is a libel (or slander) per se is solely for the court.

2. The statement of the controlling law (PA 27; 389 F. 2d at 583):

> We find that the general law and Florida law are in agreement with Dean Prosser's conclusion: "It is for the court *in the first instance* to determine whether the words are reasonably capable of a particular interpretation, or whether they are necessarily so; it is then for the jury to say whether they were in fact understood as defamatory. If the language used is open to two meanings . . . it is for the jury to determine whether the defamatory sense was the one conveyed. (Emphasis by the Court)

3. Statements as to the nature of the publication.

Two of the judges of the Fifth Circuit Court of Appeals were of the opinion that the defendants made a case — "just barely" — for the view that the article was non-defamatory.[1] The same two judges also stated (PA 32; 389 F. 2d at 585):

> The Court has very little doubt that it carries a defamatory meaning. The Court has concluded however that the final determination of the issue of defamation should be made by a jury.

The third judge, specially concurring, was unequivocal in his opinion that the language was clearly capable of only a defamatory meaning:

> I fail to see any way in which reasonable men could construe the statements, oral and written,

[1] "The defendants make a case — just barely — for the view that the article is capable of being reasonably interpreted as non-defamatory. But since the article on its face is also capable of carrying a defamatory meaning, it is for the jury to decide whether the words were in fact so understood. (PA 30), Belli v. Orlando Daily Newspapers, Inc., 389 F. 2d 579 at 584.

in this case in a nondefamatory sense, and would therefore hold them defamatory as a matter of law. The expressed doubt of the majority whether the newspaper statements could carry a nondefamatory meaning is but little less firm than my view.[2] (PA 40)

REASONS FOR DENYING THE WRIT

1. *The decision of the Fifth Circuit Court of Appeals is not in conflict with the constitutional standard as set forth by this Court in Curtis Publishing Co. v. Butts,* 388 U.S. 130, 18 L. Ed. 2d 1094, 87 S. Ct. 1975 (1967) *and by the 8th Circuit Court of Appeals in Pauling v. Globe-Democrat* Publishing Co., 362 F. 2d 188 (1966).

Petitioners frame the question presented (PW 2):

> Whether defendants, in a libel action filed by a public figure, must show that the alleged defamatory matter is directed towards the plaintiff's public conduct in order to avail themselves of the *New York Times* privilege.

New York Times and its progeny clearly answer that question to conclusion. For example, in *Curtis Publishing Co. v. Butts, supra,* Mr. Justice Harlan begins the opinion of the Court (PA 45) by summarizing *New York Times:*

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[2]389 F2d at 589. Judge Godbold would have decided the defamatory nature of the publication as a matter of law, reasoning: "The role of the jury is not to be excised. Nor is that of judges. If the content of language is defamatory beyond cavil, freedom does not call for allowing the defamer to make a second attack on the victim's reputation, though done in a judicial atmosphere, on the theory of showing that to the common mind the victim has not suffered in esteem. Judges deal regularly with questions of what ordinary and reasonable people do and think, in the field of constitutional liberties as well as elsewhere, and the properly exercisable judicial role is not diminished on the ground that reputation is what is injured." 389 F. 2d 579 at 589.

> In *New York Times Co. v. Sullivan*, 376 US 254, 279-280, 11 L. Ed. 2d 686, 706, 84 S. Ct. 710, 95 ALR 2d 1412, this Court held that "[t]he constitutional guarantees* [of freedom of speech and press] require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood *relating to his official conduct* unless he proves that the statement was made with 'actual malice'— that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

Mr. Chief Justice Warren similarly began his separate opinion concurring in the result (PA 75)[3]:

> In the New York Times case, we held that a state cannot, consistently with the First and Fourteenth Amendment, award damages to a "public official" for a defamatory falsehood *relating to his official conduct* unless the verdict is based on proof of "actual malice"—that is, proof that the defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not."

In extending the qualified privilege for false defamation to a "public figure", this Court did not broaden the immunity from liability for false defamation beyond that spelled out in *New York Times*. Certainly, this Court does not discriminate against a "public figure" by giving him less recourse for a false defamation than that given to a "public official" as petitioners speciously urge. No opinion of this Court has ever afforded the press immunity to pub-

[3]Curtis Publishing Co. v. Butts, 388 U.S. 130, 162; 18 L. Ed. 2 1094, 1115; 87 S. Ct. 1975.

lish false statements of fact concerning a "public official" —or a "public figure"—where the false statements were irrelevant or unconnected with areas of legitimate public interest or concern.

The very language petitioners here complain of, alleging conflict with *Butts, supra,* was taken verbatim from Chief Justice Warren's opinion in that very same case: (PA 76)[4]

> ***Under any reasoning, General Walker was a public man in whose *public conduct* society and the press had a legitimate and substantial interest.

Even in those cases giving the press and the public an absolute privilege, such as during the course of judicial, legislative or administrative proceedings, it is almost universally held that the publication must be connected with, or relevant or material to, the cause in hand or subject of inquiry. In the early case of *Myers v. Hodges*,[5] establishing the absolute privilege for defamatory words during the course of judicial procedure for the first time in Florida, the Florida Supreme Court, considering and relying on 44 cases from practically every jurisdiction in the United States, held:

> In the United States, according to the overwhelming weight of authority, in order that defamatory words, published by parties, counsel, or witnesses in the due course of a judicial procedure, may be absolutely privileged, they must be

[4] *Id.* at 18 L. Ed. 2d 1117).
[5] (1907) 53 Fla. 197, 44 So. 357.

> connected with, or relevant or material to, the cause in hand or subject of inquiry. If they be so published and are so relevant or pertinent to the subject of inquiry, no action will lie therefor, however false or malicious they may in fact be. (Citations omitted)

Implicit, if not express, in every opinion of this Court concerning First Amendment rights is the necessity that privileged defamatory falsehoods pertain to some area of legitimate substantial public interest and concern. Petitioners' first reason urged for granting the writ is without basis.

2. The question presented by the Petition, supra, (PW 2) is not of crucial concern and importance to the protection of the First Amendment freedoms.

Despite this Court's adamant refusal to abandon *New York Times* and its offspring and give the press an absolute "unconditional right to say what one pleases about public affairs",[6] petitioners urge this Court to give the press an absolute license to publish a malicious, false and defamatory article concerning Respondent Belli about an event that occurred nine years prior and totally unrelated to any legitimate public discussion, public concern, public interest or public affair. Like *Butts*, the article *sub judice* was not "hot news",[7] and unlike *Walker* was not "news

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[6]Justice Black joined by Justice Douglas concurring and dissenting in *Rosenblatt v. Baer*, 383 U.S. at 94, 15 L. Ed. 2d at 610, 86 S.Ct. 669. In *New York Times Co. v. Sullivan*, 276 U.S. at 293, 11 L. Ed. 2 at 716. Justice Black, joined by Justice Douglas phrased their minority view "that the defendants had an absolute, conditional constitutional right to publish in the Times advertisement their criticisms of the Montgomery Agencies and officials." Also see *Curtis Publishing Co. v. Butts* (PA 83-84) 18 L. Ed. 2d at 1120.

[7]In *Curtis Publishing Co. v. Butts, supra*, the Court noted: "The evidence showed that the Butts story was in no sense "hot news" and the editors of the magazine recognized the need for a thorough investigation of the serious charges."

which required immediate dissemination".[8] Even Messrs. Justices Black and Douglas, who consistently and eloquently urge this Court to broaden the *New York Times* privilege from qualified to absolute, have not advocated such unequal protection of the law in favor of the press.

Chief Justice Warren tersely concluded his opinion in *Butts, supra*, with the obvious reason why this Court has steadfastly refused to go as far as the press would like (PA 81):[9]

> Freedom of the press under the First Amendment does not include absolute license to destroy lives or careers. *Butts, supra.*

The opinion of the Court in *Butts* makes clear that our case revolves upon "consideration of the factors which arise in the particular context". (PA 59), 18 L. ed. 2d 1107.

Petitioners are in error when they state that the "facts and circumstances surrounding this case seem to lie somewhat between those of *Butts* and Walker (PW 7). We respectfully submit that the facts and circumstances between those *sub judice* and those of *Butts* and Walker are disparate.

3. The decision of the Fifth Circuit Court of Appeals is in accord with New York Times and its progeny.

Patent from the Fifth Circuit Court opinion is its careful consideration, not only of *New York Times* but of *Butts, supra, Garrison v. Louisiana* (1964) 379 U.S. 64,

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[8] *Id.* at page 1113.
[9] Id. at p. 1120.

85 S.Ct. 209, 13 L. ed. 2d 125; *Rosenblatt v. Baer*, (1966) 383 U.S. 75, 86 S.Ct. 669, 15 L. Ed. 2d 597, as well as *Pauling v. Globe-Democrat Publishing Co.*, (8th Circuit, 1966) 362 App. 2d 188, and many other lower Federal Court decisions (PA 36-38) 389 F. 2d 579.

Petitioners' Point 3 (PW 7-9) is a mere rehash of their argument under Point 1 (PW 5-6) and we will not burden this Court with further rebuttal except to refer back to our discussion on pages 3-5, *supra*, and to point again to the *Butts* opinion, wherein Chief Justice Warren, adhering to the *New York Times* standard stated (PA 75):[10]

> More significantly, however, the *New York Times* standard is an important safeguard for the rights of the press and public to inform and be informed on *matters of legitimate interest.* Evenly applied to cases involving "public men"—whether they be "public officials" or "public figures"—it will afford the necessary insulation for the fundamental interests which the First Amendment was designed to protect.

Respondent respectfully submits that if a Court is capable of deciding whether a named individual is a "public figure" within the *Butts* rule, that same Court, *given proper standards*,[11] is just as capable of determining whether the alleged defamation concerns a matter in which the public has a legitimate concern or interest.

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[10]Id. at 1117.

[11]As urged by respondent, *infra*, p. 10.

For the reasons and upon the authorities stated above, respondent opposes the granting of the writ on the question presented by the petitioners (PW 2, *supra*, page 3). We think the Court should take jurisdiction of this cause and grant certiorari for other reasons presented by the Record.

REASONS FOR GRANTING THE WRIT

Considering that the complaint was filed almost 4 years ago—13 August 1964—and the cause is not yet at issue, in a desire to avoid the tribulations of another plaintiff as described by Mr. Justice Fortas in his dissent in *Time, Inc. v. Hill*,[12] respondent Belli asks this Court to grant the writ for other reasons and clarify the law on at least one question that has not yet been passed upon by this Court:

> WHAT CONSTITUTES CONDUCT OF A PUBLIC FIGURE IN WHICH SOCIETY AND THE PRESS HAVE A LEGITIMATE AND SUBSTANTIAL PUBLIC INTEREST?

If past is prologue, the same "insuperable obstacles" await plaintiff Belli that plaintiff Hill endured in *Time, Inc. v. Hill*, unless this Court (as it did in *New York Times* on the issue of actual malice) dispenses with the niceties and settles certain issues as a matter of law. With due diffidence, respondent suggests that the polarized divergence of the judicial interpretations placed upon one article by four Federal Judges exemplifies the quagmire Mr.

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[12]385 US 374 at 411, 17 L. Ed. 2d 456 at 480.

***But he has litigated this case for 11 years. He should not be subjected to the burden of a new trial without significant cause. This does not exist. Perhaps the purpose of the decision here is to indicate that this Court will place insuperable obstacles in the way of recovery by persons who are injured by reckless and heedless assaults provided they are in print, and even though they are totally divorced from fact.

Justice Black warned against in his clarion dissent in *Butts*, (PA 84):[13]

> It strikes me that the Court is getting itself in the same quagmire in the field of libel in which it is now helplessly struggling in the field of obsenity. No one, including this Court, can know what is and what is not constitutionally obscene or libelous under this Court's rulings.

The trial judge adjudicated that the article did not "subject the plaintiff to 'hatred, distrust, ridicule, contempt or disgrace . . .'" (PA 18) and dismissed the complaint because the publication was not libel per se. Circuit Judge Godbold, specially concurring, "failed[ed] to see any way in which reasonable men could construe the statements, oral and written, in this case in a nondefamatory sense and would therefore [have held them] defamatory as a matter of law." (PA 40).[14] Circuit Judge Wisdom, joined by District Judge MacRae, held *vel non* the article was defamatory was a question for the jury, stating "The Court has some doubt whether the publication in question carries a non-defamatory meaning. The Court has very little doubt that it carries a defamatory meaning." (PA 32);[15] but "The defendants ma[d]e a case — just barely—for the view that the article is capable of being reasonably interpreted as non-defamatory." (PA 30)[16]

Unless this Court grants its gracious writ and establishes guideposts for the trial court to determine what constitutes that "public conduct" in which society and the

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[13]*Curtis Publishing Co. v. Butts*, 388 US at 171, 18 L. Ed. 2d at 1120.
[14]389 F. 2d 589.
[15]389 F. 2d 585.
[16]Id. at 584.

press have a legitimate and substantial interest, the eventual trial of this case has the prospect of bedlam.

Respondent respectfully prays that this Court grant its writ of certiorari and answer the following questions:

1. WHAT CONSTITUTES CONDUCT OF A "PUBLIC FIGURE" IN WHICH SOCIETY AND THE PRESS HAVE A LEGITIMATE AND SUBSTANTIAL INTEREST?

and

2. WHETHER THE PUBLICATION *SUB JUDICE* IS CAPABLE OF A NONDEFAMATORY MEANING?

For the reasons and upon the authorities cited herein, respondent respectfully prays that this Court deny the writ for the reasons suggested by petitioners and grant the writ for the reasons urged by respondent.

Respectfully submitted,

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By_____
PAUL A. LOUIS

_____
BERTHA CLAIRE LEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response in Opposition to Petition for Writ of Certiorari was furnished by mail this _____ June 1968 to William Y. Akerman, Esquire, 506 First National Bank Building, Orlando, Florida, 32802, counsel for petitioners.

PAUL A. LOUIS